Supreme Court, U.S.
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NO.

IN THE

Supreme Court of the United States

EMIL NOTTI, ET AL.,

Petitioners,

v.

COOK INLET REGION, INC.,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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67 pp

QUESTIONS PRESENTED

Petitioning shareholders in an Alaska business corporation for profit sued their corporation in state court because the respondent corporation was paying discriminatory dividends in violation of a state law requiring equal treatment of all shares of the same class of stock.

Respondent corporation removed to federal court on the ground that state corporate law has incorporated a federal law that purportedly allows these discriminatory payments. The district court denied remand and dismissed on the merits; the Ninth Circuit affirmed.

The ultimate issue is whether the incorporation of a federal law by state law allows the removal under 28 U.S.C. § 1441 to federal court of a state corporate law claim for breach of the corporate contract, and the subsequent finding of federal question jurisdiction under § 1331.

Should this Court resolve the issues it left open in *Merrell Dow:*

1. Can the adoption of federal law by a state statute give rise to § 1331 federal question jurisdiction when the federal law does not occupy the field, does not entirely displace state law, does not create a federal cause of action, and does not contain a federal remedy?
2. Should this Court adopt a bright line rule requiring the existence of a private cause of action and remedy under federal law before it will allow § 1331 jurisdiction?
3. Should this Court adopt a bright line rule that a federal law that provides no private remedy cannot supply a "jurisdiction-triggering federal question"† and thus cannot give rise to § 1331 jurisdiction?

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† *Merrell Dow Pharmaceuticals v. Thompson,* 478 U.S. 804, 817 & n.15 (1986).

LIST OF PARTIES ‡

Petitioners, Shareholder Plaintiffs-Appellants:

EMIL NOTTI

JAMES GROTHA

GLEN KERR

SAM PEDRO

ELLA RING

All are shareholders of CIRI and are residents of Alaska.

Respondent, Corporate Defendant-Appellee:

COOK INLET REGION, INC. [CIRI]

An Alaska business corporation for profit with its headquarters in Anchorage, Alaska.

‡ Pursuant to Supreme Court Rule 29.6, petitioners state that Cook Inlet Region, Inc. [CIRI] has no parent company.

Because initial ownership of CIRI's stock was restricted to Alaska Natives and because the stock is subject to alienability restrictions, there is no "publicly held company owning 10% or more of the corporation's stock."

The alienability restrictions are found in the Alaska Native Claims Settlement Act, ANCSA § 7(h)(1)(B) and (C) [43 U.S.C. § 1606(h)(1)(B) and (C)].

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PETITION FOR WRIT OF CERTIORARI

The petitioners, Emil Notti and four of his fellow shareholders, who are the five named plaintiffs in this suit against their Alaska business corporation, request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit that was entered in this case on 22 March 2002.

OPINIONS BELOW

The memoranda opinions and orders of the United States District Court for the District of Alaska (John Sedwick, J.) have not been reported. There are three such memoranda, the first two (issued on 8 November 2000 and on 5 December 2000) denying the plaintiff-shareholders' motion to remand and the third (issued on 1 May 2001) granting the respondent-corporation's motion for summary judgment. All three memoranda are reprinted in the appendix, below, at pages 1a, 16a, and 21a.

The opinion of the Court of Appeals for the Ninth Circuit, which was entered on 22 March 2002, is reprinted at 31 Fed.Appx. 586 (9th Cir. 2002). The opinion is set out in the appendix, below, at 27a.

The order denying the petition for rehearing was entered on 19 April 2002, and also is included in the appendix at 30a. The mandate issued on 29 April 2002.

JURISDICTION

This lawsuit was filed in a state court and later removed to federal court. It was filed in the Superior Court of the State of Alaska at Petersburg on 22 June 2000, and was removed to the District Court for the District of Alaska by a notice of removal that was filed on 11 August 2000.

The plaintiff shareholders, Notti et al., who are the petitioners here in this Court, protested the jurisdiction of the federal court and they moved to remand to state court. The district court denied remand in a pair of orders issued in late 2000, denied the shareholders' request for leave to file an interlocutory appeal on the remand issue, then granted CIRI's motion for summary judgment, and dismissed the case by order signed on 1 May 2001. The

district court entered its final judgment of dismissal with prejudice on 2 May 2001, and denied reconsideration on 11 May 2001. The shareholders noted their appeal to the Court of Appeals for the Ninth Circuit on 31 May 2001.

The appeal was decided by a panel of three judges: Circuit Judge Alarcon from Los Angeles, Circuit Judge Silverman from Phoenix, and District Judge Brewster from San Diego.

After oral argument in Seattle on 5 March 2002, the Court of Appeals affirmed the district court's decision in an opinion issued on 22 March 2000. Rehearing was denied on 19 April 2002.

Petitioners submitted a timely application to extend the time for filing this petition for writ of certiorari, and the application was granted by order of Circuit Justice O'Connor on 8 July 2002. That action extended the deadline for filing this petition to and including 19 August 2002, the date upon which it is being filed.

The jurisdiction of the Supreme Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes principally involved in this case are parts of the Alaska Corporations Code, AS 10.06 [ACC], primarily AS 10.06.305(b) and AS 10.06.408; *and* the Alaska Native Claims Settlement Act [ANCSA]: ANCSA § 7(h)(1)(A), which is codified at 43 U.S.C. § 1606(h)(1)(A); *and* ANCSA § 7(r) [43 U.S.C. § 1606(r)]. These and other relevant provisions of state and federal law are included below in the Appendix.

The shareholders relied upon the state law prohibition against setting a retroactive record date, found in AS 10.06.408, and the requirement of equal treatment of shares found in AS 10.06.305(b) and -.313 ("shares of the same class shall be identical"):

> **AS 10.06.305. Creation, classes, and issuance of shares.**
>
> (b) All shares of a class shall have the same voting, conversion, and redemption rights and other rights, preferences, privileges, and restrictions, unless the class is divided into series. If a class is divided into series, all the shares of a series shall have the same voting, conversion, and redemption rights and other rights, preferences, privileges, and restrictions. (§ 1 ch 166 SLA 1988).

The district court relied in part upon an Alaska statute, AS 10.06.960(f), for the proposition that Alaska law incorporates a federal law (ANCSA):

> **AS 10.06.960. Corporations organized under ANCSA.**
>
> (f) Notwithstanding the other provisions of this chapter, a corporation organized under the act is governed by the act to the extent the act is inconsistent with this chapter, and the corporation may take any action, including amendment of its articles, authorized by the act, and the action is considered to be approved and adopted if approved under the act.

The federal law that was held by the lower courts to be incorporated into the plaintiffs' cause of action is ANCSA § 7(r) [43 U.S.C. § 1606(r)], which CIRI argued has preempted the Alaska Corporations Code and which allows CIRI to pay a discriminatory to

dividend only to its original shareholders who are over the age of 65 years:

ANCSA § 7(r) [43 U.S.C. § 1606(r)]

(r) BENEFITS FOR SHAREHOLDERS OR IMMEDIATE FAMILIES.

The authority of a Native Corporation to provide benefits to its shareholders who are Natives or descendants of Natives or to its shareholders' immediate family members who are Natives or descendants of Natives to promote the health, education, or welfare of such shareholders or family members is expressly authorized and confirmed. Eligibility for such benefits need not be based on share ownership in the Native Corporation and such benefits may be provided on a basis other than pro rata based on share ownership.

The petitioning shareholders rely upon ANCSA § 7(h)(1)(A), which says that Alaska Native corporations are chartered and governed according to Alaska law unless state law is expressly preempted by a specific provision of federal law:

ANCSA § 7(h)(1)(A) [43 U.S.C. § 1606(h)(1)(A)] RIGHTS AND RESTRICTIONS.—

(A) Except as otherwise expressly provided in this Act, Settlement Common Stock of a Regional Corporation shall—

(i) carry a right to vote in elections for the board of directors and on such other questions as properly may be presented to shareholders;

(ii) permit the holder to receive dividends or other distributions from the corporation; and

(iii) *vest in the holder all rights of a shareholder in a business corporation organized under the laws of the State.*

(emphasis added). Statements that these corporations are defined, created, and governed by state law are found elsewhere in ANCSA, such as in §§ 3(g), 3(t), and 39.

The complete text of these statutes is set out in the appendix, below at pgs. 31a - 39a.

STATEMENT OF THE CASE

This is a state-law contract dispute between Alaska shareholders and their corporation; it is about corporate discrimination in the payment of dividends: Cook Inlet Region, Inc. [CIRI] pays extra dividends to some shares but not to others of the same class of stock. Only *original* shareholders *over the age of 65 years* are paid the extra dividend of $450.00 per quarter.

The first discrimination (paid only to *original* shareholders) violates AS 10.06.408 because it sets a retroactive record date and employs "snapshot eligibility," the forbidden practice of using an old picture of the shareholders to determine present eligibility.

The second discrimination (paid only to *older* shareholders) violates AS 10.06.305(b), -.313, and -.542 because discriminates among holders of the same class.

No court has ever approved a discriminatory dividend. Centuries of corporate law require that a

corporation pay its dividends in a uniform and pro rata manner to all shares of the same class of stock.[1] But the lower courts have approved a discriminatory dividend — and opened the door to a tidal wave of corporate discrimination—doing so on the most slender reed: an *implied preemption* of a monolithic rule of state law by a weak, amorphous federal statute.

A third flaw in CIRI's discriminatory dividend is that all of its directors are *original shareholders*, so they voted themselves a special financial benefit that was not

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[1] When a corporation makes distributions and pays dividends to shareholders, it must do so on a pro rata basis and without discrimination. Victor Brudney, *Equal Treatment of Shareholders in Corporate Distributions and Reorganizations*, 71 CALIF.L.REV. 1072, 1076-78 (1983) ("Dividends among shareholders of the same class generally must be distributed on a pro rata basis without discrimination or preference."). *See also*, Richard M. Buxbaum, *Preferred Stock — Law and Draftsmanship*, 42 CALIF.L.REV. 243, 247 (1954) ("Dividend rights of shareholders are contractual." "Equal shares receive equal dividends."); FLETCHER, 11 CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS, § 5352 (1995 rev'd. vol.) ("Dividends among shareholders of the same class generally must be distributed on a pro rata basis without discrimination or preference. In other words, the board of directors cannot pay dividends only to certain shareholders to the exclusion of others of the same class"). *See generally*, CLARK, CORPORATE LAW, §1.2, 13 (1986) (shares of common stock possess rights, including "the right to share pro rata (that is, the same amount for each share) in dividend payments"); HENN AND ALEXANDER, LAWS OF CORPORATIONS, §324 (3d ed. 1983) ("The basic dividend rule is that all shareholders participate ratably in dividends"); 18B AMJUR2D, *Corporations*, §1220 (1985) ("Directors have no authority to declare a dividend on any other principle").

approved by disinterested directors and that was not approved by the general rank-and-file shareholder population, as required by AS 10.06.478(a)(1) and (2). The special dividend was poisoned by the directors' conflict of interest.

The plaintiffs' complaint meticulously stated only state corporate law causes of action. On its face it contained no federal law claims, only the statutory and parallel common law claims under the state corporations code.

CIRI was successful in persuading the district court that a purely state law claim is really a federal law claim because AS 10.06.960(f) incorporates ANCSA by reference. Here is the central passage in the district court's decision, which explains the heart and soul of this jurisdictional battle:

> Here, for reasons already discussed, ANCSA is an integral part of the state provisions in question. The substantive scope of state law is defined by reference to federal law. The federal question does not arise as a defense; instead, it defines the nature of state law. Under these circumstances — admittedly somewhat unique — federal law is a "necessary element" of the state claim. It seems probable to this court that federal question jurisdiction exists.
>
> Notti raises another argument which is less easily dismissed. Citing Third and Fifth Circuit precedent, Notti contends that a federal claim subsumed within a state cause of action creates a federal question only when the federal law creates a cause of action. There is some support for this argument. Indeed, perhaps the leading contemporary scholar, Professor Erwin Chemerinsky, writes:
>
> > The decisions interpreting § 1331 can be best summarized by the following principle: A case

> arises under federal law if it is apparent from the face of the plaintiff's complaint either that the plaintiffs cause of action was created by federal law; or, if the plaintiffs cause of action is based on state law, a federal law that creates a cause of action is an essential component of the plaintiff's claim. [Erwin CHEMERINSKY, FEDERAL JURISDICTION, § 5.2.3 at 274 (3rd ed. 1999)[2]]

However, the Ninth Circuit has not adopted this test. Furthermore, the test adopted by the Ninth Circuit (discussed above) appears to apply a different standard. Moreover, even Professor Chemerinsky concedes that United States Supreme Court precedent is "inconsistent" and that "the Court has never formulated a clear test for deciding when a case 'arises under' federal law for purposes of § 1331. In analyzing whether a federal claim subsumed within a state cause of action may create a federal question, Professor Chemerinsky emphasizes that "[u]nfortunately, the Supreme Court has not formulated a clear test to determine when the presence of a federal law in a state law action constitutes a federal question." Professor Chemerinsky additionally observes that, under the United States Supreme Court's decision in *Franchise Tax Board v. Construction Laborers Vacation Trust,* federal question jurisdiction exists if the "federal law creates the cause of action or . . . [if] the plaintiffs right to relief necessarily depends on resolution of a substantial question of federal law." This alternate

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[2] The district court should have turned the page and read Professor Chemerinsky's following subsection, entitled *Federal statute must itself create a cause of action* in order to understand why ANCSA does not give rise to § 1331 jurisdiction. *See id.*, § 5.2.3 at pgs. 284-85. *See also, id.* at 280 -83, discussing *Smith* jurisdiction and the *Merrell Dow* case.

formulation suggests that the federal law need not create a cause of action to support federal question jurisdiction.

Consequently, although one might read authority from other circuits to support Notti's position that the federal law subsumed within a state claim must create a cause of action before a federal question will exist, this principle does not appear to be as clear as Notti contends.

District court's PRELIMINARY ORDER, 8 November 2000. Complete text in Appendix, infra, at 6a - 7a.

The district court veered off the road because it failed to observe the quintessential features of CIRI's statute, ANCSA § 7(r), which:

- Does not create a cause of action — because it is a purely permissive statute; it is passive, does not command or prohibit any conduct. Therefore it cannot be violated. Neither a corporation or a shareholder could sue to enforce this law because there is nothing to enforce.
- Does not contain a remedy — no enforcement provision or mechanism and nothing to enforce.
- Does not displace state law — because it is merely passive and permissive.
- Does not contain a jurisdictional grant — on the contrary, Congress said ANCSA does not confer jurisdiction. ANCSA § 2(f) [43 U.S.C. § 1601(f)] ("no provision of this Act shall be construed to constitute a jurisdictional act, to confer jurisdiction to sue, nor . . .").

REASONS FOR GRANTING THE WRIT

I. THERE IS A CONFLICT AMONG THE CIRCUITS — THEY ARE SPLIT ON FEDERAL QUESTION JURISDICTION OVER STATE LAW CLAIMS

Either by serendipity or by petitioners' unalloyed good fortune, the most recent issue of the HARVARD LAW REVIEW bears an article that explains it all.[3]

The central question is when, and under what circumstances, does a federal court have jurisdiction to decide claims that arose under state law? When one body of law incorporates the other? (Usually it is state law that incorporates federal law, but sometimes the converse situation is presented.)

The origin of the debate and continued uncertainty about this topic can be traced at least as far back as this Court's decision in *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921). In *Smith*, Justice Holmes dissented and adhered to his rule (known as the

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[3] Matthew S. Hellman, *Mr.* Smith *Goes to Federal Court: Federal Question Jurisdiction over State Law Claims Post-*Merrell Dow, 115 HARV.L.REV. 2272, 2279-82 & especially nn. 49-52 (2002) ("the circuits have split nearly evenly, and sometimes within themselves, on the status and scope of *Merrell Dow's* private right of action requirement") [hereinafter: *Mr.* Smith *Goes to Federal Court*].

"Holmes Test") that "a suit arises under the law that creates the cause of action."[4]

After Justice Holmes retired, this issue resurfaced in the *Moore* case[5], which has become the antipode of *Smith*.

The *Smith* and *Moore* cases have taken opposite views about when a case arises under federal law where the initial claim or cause of action is a state law claim. This issue arose again in *Merrell Dow Pharmaceuticals v. Thompson*, 478 U.S. 804 (1986), which might seem to approve of *Smith* while expressing a narrower — though *vague* in critical respects — view of permissible federal interests.

As Mr. Hellman explains in his current article, there is not merely confusion and uncertainty in this area of law, but there is outright *conflict between the circuits*[6]:

> In light of this conflicting language and the Court's subsequent silence, the circuits have split nearly evenly, and sometimes within themselves, on the status and scope of *Merrell Dow's* private

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[4] *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) (Holmes, J.).

[5] *Moore v. Chesapeake & Ohio Ry. Co.*, 291 U.S. 205 (1934).

[6] There is also intra-circuit conflict within the Ninth Circuit. *Mr.* Smith *Goes to Federal Court*, 115 HARV. L.REV. at 2281 & n. 50 (2002). This petition focuses on the inter-circuit conflict, which poses an issue of nation-wide importance. The Ninth Circuit's woes also can be resolved if this Court will grant review and fashion a workable rule.

> on the status and scope of *Merrell Dow's* private right of action requirement. The crux of the disagreement is whether the presence of a private right of action is the only road to *Smith* jurisdiction after *Merrell Dow* or whether *Smith* jurisdiction remains open for state law claims that present federal issues that a federal court should decide. As a result of the nearly even split among the appellate courts, litigants will find it difficult to predict whether a court will take jurisdiction over their *Smith* claims in the absence of a federal cause of action.

Mr. Smith *Goes to Federal Court*, at 2281-82 (footnotes omitted).

Conclusion: This court should resolve the conflict among the circuits by adopting a bright line rule that allows § 1331 jurisdiction only when the federal law at issue both creates a private cause of action under federal law *and* also provides a remedy under federal law.

II. THE QUESTIONS LEFT UNANSWERED IN *MERRELL DOW* SHOULD NOW BE ANSWERED BY THIS COURT

This Court's decision in *Merrell Dow* has left a trail of uncertainty because that decision embraces conflicting rules about federal jurisdiction.

The uncertainty is the need, *vel non*, for a private right of action? And for a private remedy? [7]

Merrell Dow does say that "the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction," *id.*, 478 U.S. 813. However, the opinion confuses judges and practicing lawyers by failing to address the importance of an independent federal cause of action in the jurisdictional formula. Is it desirable but not necessary? Or is it a *sine qua non* for § 1331 jurisdiction? *See, id.*, 478 U.S. at 814 & n.12 (focusing on nature of the claim and interest balancing—not the stuff from which practical rules can be fashioned).

Again, Mr. Hellman's article informs the discussion. Part II of the article "argues that discretion is undesirable, as a policy matter, to the extent that it leads

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[7] The importance of both a private cause of action and a private remedy can be traced to the four-factor test of *Cort v. Ash*, 422 U.S. 66, 78 (1975), where Justice Brennan collected the four elements that must be considered when deciding whether there is a remedy to be found in a federal statute that does not expressly provide one.

Cort v. Ash is the first of several adoptions by this Court of the Internal Affairs Doctrine, which says that "state law will govern the internal affairs of the corporation." *Id.*, 422 U.S. at 84. *See also*, DOUGLAS M. BRANSON, CORPORATE GOVERNANCE, v (1993) ("state law is the heart and soul of United States corporation law"). *See generally*, Note, *The Internal Affairs Doctrine: Theoretical Justifications and Tentative Explanations for Its Continued Primacy*, 115 HARV.L.REV. 1480 (2002).

to a lack of clarity about jurisdictional rules." *Mr.* Smith *Goes to Federal Court*, at 2273, 2277-84.[8]

To clarify the law in the wake of *Merrell Dow*, this court should explain:

- Is a private cause of action under federal law a *sine qua non* for the existence of § 1331 jurisdiction?
- Can *Smith* jurisdiction exist in the absence of a private right of action?

Conclusion: This court should decide whether the doctrine of *Smith v. Kansas City Title & Trust Co.*, and its younger cousin, *Merrell Dow*, allow a federal court to find federal question jurisdiction in a suit presenting a state law claim, where the federal law incorporated by the state claim does not create a federal cause of action and does not provide a federal remedy.

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[8] Reliance upon a law review article to explain the need for a change in the law of federal jurisdiction has historic precedent in this Court. The famous example from legal history is the celebrated article by Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV.L.REV. 49, 84-88 (1923), which revealed the historical error in *Swift v. Tyson*, 16 Pet.1, 10 L.Ed. 865 (1842), and which lead to *Swift's* overruling in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

III. THE FRICTION BETWEEN *SMITH* AND *MOORE* SHOULD BE CURED AND PUT TO REST

Long enough. This problem has been with us since 1934. Even Mr. Justice Brennan thought the two cases were causing trouble:

> My own view is in accord with those commentators who view the results in *Smith* and *Moore* as irreconcilable.

Merrell Dow, 478 U.S. at 821-22, n. 1 (Brennan, J. dissenting).

The academic community agrees. Professor Currie devotes six pages of his little treatise to the *Smith - Moore* debate, concluding:

> It is not easy to reconcile these decisions. In *Moore* as well as *Smith* the result turned upon construction of federal law; in neither case did federal law provide a remedy.

DAVID P. CURRIE, FEDERAL JURISDICTION IN A NUTSHELL, 70 - 75 (4th ed. 1999). Professor Miller seems to agree. *See, e.g.*, Arthur Miller, *Artful Pleading: A Doctrine in Search of Definition*, 76 TEX.L.REV. 1781, 1786-93 (collecting cases that illustrate the confusion in the law on this topic).

Conclusion: This Court should resolve the apparent conflict between *Smith* and *Moore* by adopting a bright line rule that allows § 1331 jurisdiction only when the federal law at issue both creates a cause of action under federal law *and* also provides a remedy under federal law.

Or, the Court should disapprove or overrule *Smith* and either fashion a workable new rule or return to the Holmes Test [9](a "suit arises under the law that creates the cause of action").

IV. THIS CASE PRESENTS A RECURRING JURISDICTIONAL PROBLEM THAT IS OF BROAD INTEREST AND IMPORTANCE

The dispute about *Smith* jurisdiction and the need to resolve issues left open in *Merrell Dow* are issues of nation-wide importance. But this case is also important to Alaska because of the large number of Alaska Native corporations that are chartered and governed by state corporate law — but that law might give rise only to federal cases? If so, then the internal affairs of Alaska's corporations will no longer be decided by Alaska courts; the Supreme Court of Alaska will no longer be the law giver on matters of corporate law in this State.

This case is also of great importance to the State of Alaska, to its economy and to its Native peoples. More than 200 Alaska Native corporations will be affected by this case. A significant part of Alaska's residents are shareholders in Alaska corporations. CIRI alone has more than 7,000 shareholders. These corporations have received almost one billion dollars of federal money and title to an area the size of Missouri

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[9] *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) (Holmes, J.).

and Kentucky combined. ANCSA §§ 6, 9, 11-16 [43 U.S.C. §§ 1605, 1608, 1610 - 1615].

This Court has a grand tradition of granting review in cases that are of special importance to Alaska. *Alaska v. Arctic Maid,* 366 U.S. 199, 201-02, 6 L.Ed.2d 227, 81 S.Ct. 929 (1961)("The case is here on a petition for certiorari which we granted because of the importance of the ruling to the new State of Alaska."). Other cases of the genre include: *Territory of Alaska v. American Can Company,* 358 U.S. 224 (1959)(certiorari "granted in view of the fiscal importance of the question to Alaska"), *Zobel v. Williams,* 457 U.S. 55 (1982) (striking down state-wide dividend distributions that were based upon length of residency in Alaska), and *Alaska v. Native Village of Venetie Tribal Government,* 522 U.S. 520, 534 (1998) ("it is worth noting that Congress conveyed ANCSA lands to state-chartered and state-regulated private business corporations, hardly a choice that comports with a desire to retain *federal* superintendence over the land") (italics in original).

V. FEDERAL COURTS LACK SUBJECT MATTER JURISDICTION WHEN THE DEFENSE OF PREEMPTION IS RAISED TO REMOVE A CASE FROM STATE COURT

This case is a good candidate for summary reversal under Supreme Court Rule 16.1 ("The order may be a summary disposition on the merits.").

This case started in an Alaska State court as a purely Alaska case. The complaint alleged CIRI had breached its shareholder contract by paying dividends in

violation of Alaska corporations statutes and in violation of the Alaska common law of corporations.

CIRI removed the case on the reasoning that its federal statute, ANCSA § 7(r), has preempted the corporations law of Alaska. Indeed, the Ninth Circuit opinion found a preemption of Alaska law. *Notti v. CIRI,* 31 Fed.Appx. 586, 587 ("ANCSA expressly preempts Alaska law").

Implicit or explicit, neither form of preemption asserted by CIRI is sufficient to support removal from a state court.

> [I]t is now settled law that a case may *not* be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint and even if both parties concede that the federal defense is the only question truly at issue.

Caterpillar Tractor v. Williamson, 482 U.S. 386, 393, 96 L.Ed.2d 318, 327, 107 S.Ct. 2425 (1987) (italics in the original).

This is not a case where there is complete pre-emption. Contrary: ANCSA §§ 2(f), 3(g), 3(t), § 7(h)(1)(A), and 39 expressly adopt state law to define, create and govern these corporations and their programs.

CONCLUSION

We need a new rule. A bright line rule, not a fuzzy unworkable rule.

A final decision about the permissible dividends that can be paid by an Alaska corporation was made by three appellate judges whose chambers are in Phoenix, Los Angeles, and San Diego — thousands of miles from

CIRI's shareholders in Anchorage, Alaska. This is the harm done by the Ninth Circuit's far-reaching grab of subject matter jurisdiction.

The Petition for Certiorari should be granted *or* the Ninth Circuit's decision should be vacated with instructions to remand to State court.

In the alternative, this Court should summarily reverse the decision of the Court of Appeals. Supreme Court Rule 16.1.

Respectfully submitted this 19th day of August in 2002 at Petersburg, Alaska.

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PETITIONERS' APPENDIX

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APPENDIX A

UNITED STATES DISTRICT COURT

DISTRICT OF ALASKA

Case No. J00-20 CV (JWS)

EMIL NOTTI; JAMES GROTHA; GLEN KERR; SAM PEDRO; ELLA RING, *et al.*, PLAINTIFFS

v.

COOK INLET REGION, INC. [CIRI], DEFENDANT

Filed November 8, 2000

PRELIMINARY ORDER

[Re: Motion to Remand - Docket 11]

I. NATURE OF ORDER

At docket 11, plaintiffs Emil Notti, *et al,* move to remand this case to state court. Defendant Cook Inlet Region, Inc. ("CIRI") opposes the motion. Oral argument is scheduled for November 30, 2000, at 8:30 a.m., in Anchorage, Alaska. This preliminary order reflects the court's tentative views concerning the motion at docket 11. It is intended to assist the parties prepare for and conduct oral argument. This preliminary order does not reflect the court's final order. The

court may or may not adopt this preliminary order as its final order after oral argument is conducted. This preliminary order does not authorize the filing of any supplemental briefing.

II. BACKGROUND

CIRI is a corporation organized pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601 *et seq.* ("ANCSA"). CIRI instituted an Elders Benefit Program which distributed dividends to shareholders age 65 or older. Notti contends that the Elders Benefit Program violates Alaska state law which prohibits discriminatory dividend distribution among shareholders.[1] CIRI removed to federal court asserting federal question jurisdiction existed because an ANCSA provision, 43 U.S.C. § 1606(r), authorizes the preferential dividend that CIRI granted. Notti seeks remand. Other facts are noted below.

III. STANDARD OF REVIEW

Subject matter jurisdiction may be challenged at any time by either party or the court *sua sponte*.[2] Removal statutes are strictly construed against removal, and any doubts regarding removal must be resolved against removal and in favor of remand.[3] If at anytime after removal it appears that

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[1] See AS 10.06.305(b).

[2] 2 James Moore, *Moore's Federal Practice*, § 12.30[1], at 12-33 (3d ed. 1998) Moore note:

> [E]ven if the litigants do not identify a potential problem in that respect, it is the duty of the court—at any level of the proceedings—to address the issue sua sponte whenever it is perceived.

Id.

[3] *Gaus v. Miles, Inc.* 980 F.2d 564, 566 (9th Cir. 1992)

the district court lacks subject matter jurisdiction, the case shall be remanded."[4] The removing party bears the burden of proof and persuasion.[5] Doubtful or close cases should be remanded.[6]

IV. DISCUSSION

Notti argues that federal question jurisdiction does not exist and that CIRI's removal was procedurally defective. Both arguments are analyzed below.

A. Whether Federal Question Jurisdiction Exists

To evaluate whether federal question jurisdiction exists, the court looks to the face of the complaint.[7] Either the complaint must allege a federal cause of action or plaintiff's claim must depend "on . . . resolution of a substantial question of federal law."[8] The court usually confines its assessment to the face of the complaint under the well-pleaded complaint rule. However, federal question jurisdiction exists in cases of complete preemption or if "vindication of a right under state law necessarily turn[s] on some construction of federal law."[9] The Ninth Circuit has distilled the relevant principles into the following test:

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[4] 28 U.S.C. § 1447(c).

[5] 14C Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper, *Federal Practice and Procedure*, § 3739, at 424, 470 (3d ed. 1998) *("Wright)*.

[6] *Wright*, § 3739, at 446.

[7] *See Easton v. Crossland Mortgage* Corp., 114 F.3d 979, 982 (9th Cir. 1997).

[8] Id. (quoting Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 27-28, 103 S. Ct. 2841, 2856 (1983)).

[9] *See Berg v. Leason*, 32 F.3d 422, 423 (9th Cir. 1994) *(quoting Franchise Tax, supra*, 463 U.S. 1, 9, 103 S. Ct. 2841, 2846 (1983)).

> A state-created cause of action can be deemed to arise under federal law (1) where federal law completely preempts state law [citations omitted]; (2) where the claim is necessarily federal in character [citation omitted]; or (3) where the right to relief depends on the resolution of a substantial, disputed federal question.[10]

Here, Notti's claims allege violation of the Alaska State Corporation Code, AS 10.06 *et seq.* for discriminatory dividend distribution. However, Title 10 expressly incorporates ANCSA with respect to its application. In relevant part, Title 10 provides:

> Notwithstanding the other provisions of this chapter, a corporation organized under [ANCSA] is governed by [ANCSA] to the extent [ANCSA] is inconsistent with this chapter, and the corporation may take any action, including amendment of its articles, authorized by [ANCSA] . . . [11]

Consequently, application of Alaska state law "turns on" construction of ANCSA, which is undeniably a federal law. CIRI therefore contends that federal question jurisdiction exists.

Notti argues that incorporation of federal law into a state-created cause of action does not create a federal question for purposes of Section 1331. However, this sweeping proposition is too broad, and the authorities relied upon by Notti are unavailing. It is true, as Notti contends, that a state claim will not be converted into a claim arising under federal

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[10] See ARCO Environmental Remediation L. L. C. v. Department of Health and Environmental Quality, 213 F.3d 1108, 1114 (9th Cir. 1998).

[11] *See* AS 10.06.960(f).

law simply because it references, relates, or depends upon federal law to some degree. For example, in *Merrell Dow Pharmaceuticals v. Thompson,* the United States Supreme Court held that a state negligence claim based, in part, on an alleged violation of federal law did not create a federal question where Congress had expressly precluded private causes of action to enforce the federal law at issue.[12] In *Rains v. Criterion Systems, Inc.,*[13] the Ninth Circuit held that if a claim "can be supported by alternative and independent theories—one of which is a state law theory and one of which is a federal law theory—federal question jurisdiction does not attach because federal law is not a necessary element of the claim."[14] In *Berg v. Leason,*[15] the Ninth Circuit held that a state law malicious prosecution claim did not arise under federal law just because one of the elements required analysis of the underlying federal claim to determine whether it was legally untenable. [16]

But these authorities are inapposite to the circumstances facing the court in this case. Here, Congress has not precluded private causes of action regarding the ANCSA provision in question. The court is not faced with alternative and independent theories. Instead, there is one state claim which expressly incorporates federal law and which hinges upon interpretation and application of that law. In analogous situations, the Ninth Circuit has held that federal question jurisdiction existed. By way of illustration, in *Sparta Surgical Corp. v. National Assoc. of Securities Dealers,*

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[12] *See Merrell Dow,* 478 U.S. at 817, 106 S.Ct. at 3237.

[13] F.3d 339 (9th Cir. 1996).

[14] *Id.* at 346.

[15] 32 F.3d 422 (9th Cir. 1994).

[16] *Id.* at 424-26.

Inc.,[17] the court held that federal question jurisdiction existed because 'although Sparta's theories are posited as state law claims, they are founded on the defendants' conduct in suspending trading and de-listing the offering, the propriety of which must be exclusively determined by federal law."[18] Here, for reasons already discussed, ANCSA is an integral part of the state provisions in question. The substantive scope of state law is defined by reference to federal law. The federal question does not arise as a defense; instead, it defines the nature of state law. Under these circumstances--admittedly somewhat unique—federal law is a "necessary element" of the state claim. It seems probable to this court that federal question jurisdiction exists.

Notti raises another argument which is less easily dismissed. Citing Third and Fifth Circuit precedent, Notti contends that a federal claim subsumed within a state cause of action creates a federal question only when the federal law creates a cause of action. There is some support for this argument. Indeed, perhaps the leading contemporary scholar, Professor Erwin Chemerinsky, writes:

> The decisions interpreting § 1331 can be best summarized by the following principle: A case arises under federal law if it is apparent from the face of the plaintiff's complaint either that the plaintiffs cause of action was created by federal law; or, if the plaintiffs cause of action is based on state law, a federal law that creates a cause of action is an essential component of the plaintiff's claim.[19]

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[17] 159 F.3d 1209 (9th Cir. 1998).

[18] *Id.* at 1212.

[19] *See* Erwin Chemerinsky, *Federal Jurisdiction* at 274 (3d. ed. 1999) (*"Chemerinsky"*).

However, the Ninth Circuit has not adopted this test. Furthermore, the test adopted by the Ninth Circuit (discussed above) appears to apply a different standard. Moreover, even Professor Chemerinsky concedes that United States Supreme Court precedent is "inconsistent" and that "the Court has never formulated a clear test for deciding when a case 'arises under' federal law for purposes of § 1331.[20] In analyzing whether a federal claim subsumed within a state cause of action may create a federal question, Professor Chemerinsky emphasizes that "[u]nfortunately, the Supreme Court has not formulated a clear test to determine when the presence of a federal law in a state law action constitutes a federal question."[21] Professor Chemerinsky additionally observes that, under the United States Supreme Court's decision in *Franchise Tax Board v. Construction Laborers Vacation Trust,*[22] federal question jurisdiction exists if the "federal law creates the cause of action or . . . [if] the plaintiffs right to relief necessarily depends on resolution of a substantial question of federal law."[23] This alternate formulation suggests that the federal law need not create a cause of action to support federal question jurisdiction.

Consequently, although one might read authority from other circuits to support Notti's position that the federal law subsumed within a state claim must create a cause of action before a federal question will exist, this principle does

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[20] *Id.*

[21] See Chemerinsky, supra at 281.

[22] 463 U.S. 1, 103 S. Ct. 2841(1983).

[23] See Chemerinsky, supra, at 281 (quoting Franchise Tax Board [citation omitted]) (emphasis added).

not appear to be as clear as Notti contends. Commenting on the unsettled state of law, Professor Chemerinsky states:

> The important, underlying issue, of course, is when does the presence of a federal issue in a state law claim present a federal question? Unfortunately, no formula or criteria exist; the Court never has done better than Justice Cardozo's explanation [that the federal question must be an essential and important element of a plaintiffs cause of action]. A majority of the Court has now endorsed the position advanced by commentators that the existence of a federal question depends on "an evaluation of the nature of the federal interest at stake." But the Court has not elaborated on the content or structure of that evaluation. Moreover, such an approach to defining federal question jurisdiction inherently is unpredictable, vesting great discretion in the district court to determine the nature of the federal interest and to decide whether that interest merits federal jurisdiction for the state law claim.[24]

This "interest-based" analysis militates in favor of CIRI. The federal interest in Native American affairs generally and ANCSA-related matters in particular is undeniably paramount. This, coupled with the fact that the state law in question hinges upon interpretation and application of ANCSA, ultimately persuades this court that federal question jurisdiction probably exists. This is a preliminary order, and the court will afford Notti an opportunity to persuade the court that the tentative views expressed in this order are incorrect. However, based on this court's understanding of the relevant legal principles, it seems probable that federal question jurisdiction exists.

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[24] See Chemerinsky, supra, at 283-84.

B. Whether CIRI's Removal was Untimely and Procedurally Defective

Notti argues that CIRI's removal was untimely and procedurally defective. With respect to the timeliness of CIRI's removal, the record establishes that Notti mailed a courtesy copy of the complaint to CIRI on or about June 22, 2000, and effected service on or about July 25, 2000. CIRI removed on August 11, 2000. Prior to 1999, these facts would have required the court to construe and apply the "receipt rule"—a rule which fostered confusion and resulted in many conflicting decisions.[25] However, in 1999 the United States Supreme Court handed down its opinion in *Murphy Brothers, Inc v. Michetti Pipe Stringing, Inc.*,[26] which held that, for purposes of the 30-day period governing removal, time runs from actual service and not from receipt of a courtesy copy of the complaint.[27] *Murphy Brothers* establishes that CIRI's removal was timely. Notti did not effect proper service until on or about July 25, 2000. CIRI removed on August 11, 2000. This was well within the 30-day period governing removal.[28]

Notti also contends that the removal procedures were defective because (allegedly) CIRI did not file a copy of the removal notice with the state court. Notti contends that removal is not effective until such a time as the notice is

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[25] *See, e.g.*, 14C Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper, *Federal Practice and Procedure*, § 3732 at 281-93, 300 (3d ed. 1998) (citing and discussing authorities)(*"Wright"*). For a brief but helpful discussion of the "receipt rule," *see Chart Development Corporation v. West Slope Water Dist.*, 22 F. Supp. 2d 1169, 1170 (D. Ore. 1998).

[26] 526 U.S. 344, 119 5. Ct. 1322 (1999).

[27] *See Murphy Brothers*, 526 U.S. at 347-48, 356,1195. Ct. at 1325, 1329-30.

[28] *See* 28 U.S.C. § 1446(b).

filed.[29] The statute governing removal procedures provides, in relevant part:

> Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all
>
> adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.[30]

Professor Wright states that "removal is effected by . . . three procedural steps: filing a notice of removal in the federal court, filing a copy of this notice in the state court, and giving prompt written notice to all adverse parties."[31] Some courts have held that removal is effective once the notice is filed in federal court "and that later completion of the other steps operates to vest subject matter jurisdiction in the federal court as of the earlier date."[32] But, according to Professor Wright, "the sounder rule, and the one most consistent with the language of Section 1446(d) of Title 28, is that removal is not effective until all the steps required by the federal statute have been taken by the defendant."[33] However, Professor Wright qualifies this observation by noting that "[t]he filing of a copy of the notice of removal in the state court is a procedural and ministerial act and a number of federal courts have held that a failure to do so will not defeat the district court's subject

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[29] *See* 28 U.S.C. § 1446(d).

[30] *See* 28 U.S.C. § 1446(d).

[31] *See Wright, supra*, § 3737 at 381.

[32] *Id.* (citing cases).

[33] *Id.* at 382 (citing cases).

matter jurisdiction."[34] Professor Wright instructs that [if] the plaintiff does object [to a defendant's failure to file the notice with state court], the defendant must correct its defective removal by filing a notice of removal with the state court clerk or by explaining its failure to do so to that court."[35] The parties have not cited any Ninth Circuit authority, and the court's preliminary research has not discovered any offering guidance.

Here, it is not precisely clear if or when CIRI filed its notice with the state court, but a fair reading of the entire record implies that the notice was filed on or about September 11, 2000. CIRI previously submitted two affidavits at docket 12. These affidavits are from Lani Gerkin, secretary to Mark Rinder, Esq., representing CIRI in this matter, and James Edward Eastman, owner of a courier service. According to Ms. Gerkin and Mr. Eastman, CIRI attempted to mail a copy of the removal notice to state court on August 11, 2000, but for some unexplained reason the courier service employee who picked up the notice failed to mail it as directed. The notice filed by CIRI at docket 12 concludes by advising that "[a] copy of the Notice of Removal, which was to be filed with the Superior Court in Petersburg, has been again sent by Express Mail on September 11, 2000, to the court in Petersburg for filing."[36]

Assuming that the notice has, in fact, been filed in state court, these facts present the court with an issue of apparent first impression in the Ninth Circuit; specifically, whether filing a notice with state court after the 30-day period has run operates to cure an otherwise procedurally defective

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[34] *See Wright, supra,* § 3736 at 379.

[35] *Id.* at 380.

[36] *See* Notice, docket 12, at p. 2.

removal. CIRI relies on a Fifth Circuit case, *Dukes v. South Carolina Ins. Co.*,[37] which held that "[f]ailure to file a copy of the removal petition with the state court clerk is a procedural defect, and does not defeat the federal court's jurisdiction."[38] This rule has been adopted by at least one district court in the Ninth Circuit.[39] This court is not necessarily convinced that the *Dukes* rule would be or should be adopted to govern all cases for all purposes. However, under the precise circumstances of this case, the court is persuaded that the *Dukes* rule represents good law and policy for five interrelated reasons. First, CIRI's removal notice was timely filed in this court, and notice to Notti was also timely given. Second, this is not a case where a defendant played fast and loose with two courts waiting to see if pending motions or proceedings in state court would be resolved in its favor.[40] Third, the failure to have the initial notice filed in state court appears to have resulted from circumstances outside counsel's control or at least not as a result of action taken by counsel. Fourth, CIRI has apparently now taken steps to ensure that the notice is filed in state court (although as noted this remains unconfirmed). Fifth and finally, Section 1446(d) does not expressly specify that the notice must be filed in state court in thirty days. Instead, it commands that the notice be "promptly" filed in state court. In short, the court is persuaded by CIRI's arguments that its failure to file its

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[37] 770 F.2d 545 (5th Cir. 1985).

[38] *Id.* at 547.

[39] See Shanks v. Northern California Cement Masons, et al., 1993 WL 150273 at *2-*3 (N.D. Cal. 1993).

[40] *See Wright, supra,* § 3736 at 379 ("The federal court should never permit the defendant to use a delay as a 'hedge' to see if there is likely to be a favorable result in the state court.").

removal notice in state court was—at most—a procedural defect which under the somewhat unique circumstances of this case it has cured by subsequent filing in state court. However, the court remains open to reaching an opposite conclusion if Notti can point to any more timely or persuasive authority in support of his arguments or if it is established that no notice has ever been filed with the state court.

C. Potential Dispositive Motion Practice

A few final comments are in order in light of this order's preliminary scope and the scheduled oral argument. ANCSA provides:

> The authority of a Native Corporation to provide benefits to its shareholders who are Natives or descendants of Natives or to its shareholders' immediate family members who are natives or descendants of Natives to promote the health, education, or welfare of such shareholders or family members is expressly authorized and confirmed. Eligibility for such benefits need not be based on share ownership in the Native Corporation and such benefits may be provided on a basis other than pro rata based on share ownership.[41]

As previously noted, state law permits ANCSA corporations to "take any action ... authorized by [ANCSA] ...."[42] Applying the ANCSA provision quoted above in conjunction with state law would seem to lead one to the inevitable conclusion that it is entirely permissible for an ANCSA

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[41] *See* 43 U.S.C. § 1606(r). This provision was added by amendment in 1998. *See* Pub.L. 105-333, § 12, 112 Stat. 3135 (October 31, 1998) (codified at 43 U.S.C. § 1606(r)).

[42] *See* AS 10.06.960(f).

corporation to allot shareholder dividends on a preferential basis. This being the case, it is difficult to understand how CIRI would not be entitled to some form of dispositive relief upon motion. The court notes this not to suggest how it will rule on any such motion, but simply to point out what appears to be an obvious conclusion. Where possible, this court attempts to identify potentially dispositive issues not otherwise discussed by the parties in order "to secure the just, speedy, and inexpensive determination of every action."[43] For purposes of expediting both an appeal of the subject matter jurisdiction issues raised in Notti's motion and the ultimate disposition of this controversy, it may be most efficient for the parties to move for dispositive relief immediately if the court denies the motion to remand.

V. CONCLUSION

For the foregoing reasons it appears probable to the court that Notti's motion at docket 11 should be denied. It also seems probable to the court that CIRI is entitled to some form of dispositive relief, although the parties have not yet briefed such issues. The court remains open to be persuaded otherwise, of course, and intends its comments to facilitate settlement or—failing that—to assist the parties prepare for and conduct oral argument. The court may or may not adopt this preliminary order as its final order following oral argument. This preliminary order does not authorize the filing of any supplemental briefing.

DATED at Anchorage, Alaska, this 8th day of November 2000.

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[43] *See* Fed. R. Civ. P. 1.

/s/ John W. Sedwick
John W. Sedwick
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF ALASKA

Case No. J00-20 CV (JWS)

EMIL NOTTI; JAMES GROTHA; GLEN KERR; SAM PEDRO; ELLA RING, *et al.*, PLAINTIFFS

v.

COOK INLET REGION, INC. [CIRI], DEFENDANT

Filed December 5, 2000

ORDER FROM CHAMBERS

[Re: Motion to Remand - Docket 11]

At docket 11, plaintiffs Emil Notti, *et al.* ("Notti"), move to remand this case to state court. Defendant Cook Inlet Region, Inc. ("CIRI") opposes the motion. The court issued a preliminary order on November 9, 2000, at docket 28, expressing its views that the motion should probably be denied.[1] Oral argument was conducted on November 30, 2000, in Anchorage, Alaska.

As discussed at length in this court's preliminary

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[1] The court herein incorporates by reference its order at docket 28.

order at docket 28, federal question jurisdiction exists in cases of complete preemption or if "vindication of a right under state law necessarily turn[s] on some construction of federal law."[2] The Ninth Circuit has distilled the relevant principles into the following test:

> A state-created cause of action can be deemed to arise under federal law (1) where federal law completely preempts state law [citations omitted]; (2) where the claim is necessarily federal in character [citation omitted]; or (3) where the right to relief depends on the resolution of a substantial, disputed federal question.[3]

Here, Notti's claims allege violation of the Alaska State Corporation Code, AS 10.06 *et seq.* for discriminatory dividend distribution. However, Title 10 expressly incorporates ANCSA with respect to its application. In relevant part, Title 10 provides:

> Notwithstanding the other provisions of this chapter, a corporation organized under [ANCSA] is governed by [ANCSA] to the extent [ANCSA] is inconsistent with this chapter, and the corporation may take any action, including amendment of its articles, authorized by [ANCSA] . . .[4]

Consequently, application of Alaska state law "turns

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[2] *See Berg v. Leason*, 32 F.3d 422, 423 (9th Cir. 1994) *(quoting Franchise Tax, supra*, 463 U.S. 1, 9,103 S. Ct. 2841, 2846 (1983)).

[3] *See ARCO Environmental Remediation L. L. C. v. Department of Health and Environmental Quality*, 213 F.3d 1108, 1114 (9th Cir. 1998).

[4] *See* AS 10.06.960(f).

on" construction of ANCSA, which is undeniably a federal law. This case is closest to *Sparta Surgical Corp. v. National Assoc. of Securities Dealers, Inc.*,[5] where the Ninth Circuit held that federal question jurisdiction existed because "although Sparta's theories are posited as state law claims, they are founded on the defendants' conduct in suspending trading and de-listing the offering, the propriety of which must be exclusively determined by federal law."[6] ANCSA is an integral part of the state provisions forming the basis of Notti's complaint. The substantive scope of state law is defined by reference to federal law. The federal question does not arise as a defense; instead, it defines the nature of state law. Under these circumstances—admittedly somewhat unique—federal law is a "necessary element" of the state claim. Federal question jurisdiction exists.

At oral argument, Notti's counsel cited *Redwood Theatres v. Festival Enterprises*,[7] and argued it compelled remand. *Redwood* does not help Notti. *Redwood* concerned state antitrust provisions independent of federal law. This court reviewed and explained the relevant principles in its preliminary order. In *Rains v. Criterion Systems*, Inc.,[8]—one of the cases discussed in this court's preliminary order—the Ninth Circuit held that if a claim "can be supported by alternative and independent theories—one of which is a state law theory and one of which is a federal law theory—federal question jurisdiction does not attach because federal law is

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[5] 159 F.3d 1209 (9th Cir. 1998).

[6] *Id.* at 1212.

[7] 908 F.2d 477, 479 (9th Cir. 1990).

[8] 80 F.3d 339 (9th Cir. 1996).

not a necessary element of the claim."[9] In *Berg v. Leason*,[10]—*another* case reviewed in this court's preliminary order—the Ninth Circuit held that a state law malicious prosecution claim did not arise under federal law just because one of the elements required analysis of the underlying federal claim to determine whether it was legally untenable.[11]

But these authorities are inapposite to the circumstances facing the court in this case. Here, Congress has not precluded private causes of action regarding the ANCSA provision in question. Unlike the situation in *Redwood, Rains,* or *Berg,* the court is not faced with alternative and independent theories. Instead, there is one state claim which expressly incorporates federal law and which hinges upon interpretation and application of federal law. Remand is therefore inappropriate under governing precedent. The balance of Notti's arguments are simply inapposite for reasons discussed at length in this court's preliminary order at docket 28.

For the foregoing reasons and those set out in the preliminary order at docket 28, Notti's motion to remand at docket 11 is DENIED.

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[9] *Id.*. at 346.

[10] 32 F.3d 422 (9th Cir. 1994).

[11] *Id.* at 424-26.

DATED at Anchorage, Alaska, this 5th day of December 2000.

/s/ John W. Sedwick
John W. Sedwick
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

Case No. J00-20 CV (JWS)

EMIL NOTTI; JAMES GROTHA; GLEN KERR; SAM PEDRO; ELLA RING, *et al.*, PLAINTIFFS

v.

COOK INLET REGION, INC. [CIRI], DEFENDANT

Filed May 1, 2001

ORDER FROM CHAMBERS

[Re: Motions at Docket Nos. 39, 40 and 41A]

I. MOTIONS BEFORE THE COURT

At docket 39, defendant Cook Inlet Region, Inc. ("CIRI") moves for summary judgment or, in the alternative, for judgment on the pleadings. The motion was filed February 28, 2001. Plaintiffs Emil Notti, *et al.* ("Notti"), have never filed an opposition. CIRI's motion is therefore ripe. At docket 40, Notti seeks leave to file an interlocutory appeal regarding this court's previous order denying a motion to remand. CIRI opposes Notti's

motion. At docket 41A, Notti seeks to stay proceedings pending resolution of its motion at docket 40. CIRI opposes this motion, too. The motion at docket 41A is technically not yet ripe. However, for reasons which will become clear further below, there is no reason to delay resolving the motion at docket 41A with the motions at dockets 39 and 40. Oral argument has not been requested and would not assist the court.

II. BACKGROUND

CIRI is a corporation organized pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601 *et seq.* ("ANCSA"). CIRI instituted an Elders Benefit Program which distributed dividends to shareholders age 65 or older. Notti contends that the Elders Benefit Program violates Alaska state law which prohibits discriminatory dividend distribution among shareholders.[1] CIRI removed to federal court asserting federal question jurisdiction existed because an ANCSA provision, 43 U.S.C. § 1606(r), authorizes the preferential dividend that CIRI granted. Notti sought remand. The court denied Notti's motion. Other facts are noted below.

III. STANDARDS OF REVIEW

A Motion for Summary Judgment

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment should be granted if there is no genuine dispute as to material facts and if the moving party is entitled to judgment as a matter of law. The moving party has the burden of showing that there is

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[1] *See* AS 10.06.305(b).

no genuine dispute as to material fact.[2] The moving party need not present evidence; it need only point out the lack of any genuine dispute as to material fact.[3] Once the moving party has met this burden, the non-moving party must set forth evidence of specific facts showing the existence of a genuine issue for trial.[4] All evidence presented by the non-movant must be believed for purposes of summary judgment, and all justifiable inferences must be drawn in favor of the non-movant.[5] However, the non-moving party may not rest upon mere allegations or denials, but must show that there is sufficient evidence supporting the claimed factual dispute to require a fact-finder to resolve the parties' differing versions of the truth at trial.[6]

B. Interlocutory Appeal

Certification of an interlocutory appeal under 28 U.S.C. § 1292 (b) is only appropriate if the issue presents a controlling question of law, there is a substantial ground for difference of opinion, and an immediate appeal "may materially advance the ultimate termination of the litigation."[7] Interlocutory appeals are rarely

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[2] *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

[3] *Id.* at 323-325.

[4] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-9 (1986).

[5] *Id.* at 255.

[6] *Id.* at 248-9.

[7] *See* 28 U.S.C. § 1292(b); *see also* 16 Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper, *Federal Practice and Procedure*, § 3930 at 415-442 (2d ed. 1996) (discussing criteria for permissive interlocutory appeals).

granted and sparingly used in deference to the federal policy disfavoring piecemeal review.[8]

IV. DISCUSSION

Notti's claims allege violation of the Alaska State Corporations Code, AS 10.06 *et seq.*, for discriminatory dividend distribution. However, Title 10 expressly incorporates ANCSA with respect to its application. In relevant part, Title 10 provides:

> Notwithstanding the other provisions of this chapter, a corporation organized under [ANCSA] is governed by [ANCSA] to the extent [ANCSA] is inconsistent with this chapter, and the corporation may take any action, including amendment of its articles, authorized by [ANCSA] . . .[9]

ANCSA provides, in part:

> The authority of a Native Corporation to provide benefits to its shareholders who are Natives or descendants of Natives or to its shareholders' immediate family members who are natives or descendants of Natives to promote the health, education, or welfare of such shareholders or family members is expressly authorized and confirmed. Eligibility for such benefits need not be based on share ownership in

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[8] *See United States v. Woodbury*, 263 F.2d 784, 788 n.11 (9th Cir. 1959); *Vaughn v. Regents of the Univ. of Cal.*, 504 F. Supp. 1349, 1355 (E.D. Cal. 1981).

[9] *See* AS 10.06.960(f).

> the Native Corporation and such benefits may be provided on a basis other than pro rata based on share ownership.[10]

Thus, ANCSA permits preferential distributions. In summary, State law authorizes ANCSA corporations to "take any action . . . authorized by [ANCSA]. . . ."[11] ANCSA permits ANCSA corporations to allot shareholder dividends on a preferential basis. It therefore follows that there is no genuine issue of material fact in dispute, and CIRI is entitled to summary judgment as a matter of law. In light of this disposition, Notti's motions at dockets 40 and 41A are moot, because Notti may now appeal this court's final judgment.

V. CONCLUSION

For the foregoing reasons:

(1) CIRI's motion for summary judgment at docket 39 is GRANTED;

(2) Notti's motion at docket 40 seeking leave to file an interlocutory appeal is DENIED as moot; and

(3) Notti's motion at docket 41A seeking leave to stay proceedings is DENIED as moot.

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[10] *See* 43 U.S.C. § 1606(r). This provision was added by amendment in 1998. *See* Pub. L. 105-333, § 12, 112 Stat. 3135 (October 31, 1998) (codified at 43 U.S.C. § 1606(r)).

[11] *See* AS 10.06.960(f).

DATED at Anchorage, Alaska, this 1st day of May 2001.

/s/ John W. Sedwick
John W. Sedwick
United States District Judge

{Reconsideration was summarily denied in a minute order from chambers on 11 May 2001.}

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 01-35521, 01-35569

EMIL NOTTI, *et al.*, PLAINTIFFS - APPELLANTS

v.

COOK INLET REGION, INC. , DEFENDANT - APPELLEE

Decided March 22, 2002.

MEMORANDUM

Appeal from the United States District Court for the District of Alaska, John W. Sedwick, District Judge, Presiding.

Before ALARCÓN, SILVERMAN, Circuit Judges and BREWSTER, District Judge[1].

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[1] The Honorable Rudi M. Brewster, Senior United States District Judge for the Southern District of California, sitting by designation.

MEMORANDUM[2]

Appellants are shareholders of Cook Inlet Region, Inc. (CIRI), a Regional Corporation established pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. § § 1601 *et seq* (ANCSA). They appeal the district court's denial of their motion to remand this action to state court, grant of summary judgment in favor of CIRI, and denial of their motion for reconsideration.

We have jurisdiction pursuant to 28 U.S.C. § 1291. We lack jurisdiction to consider appellants' taking claim, raised to the district court on reconsideration, because appellants must raise that claim under the Tucker Act in the Federal Court of Claims. *Bay View, Inc. ex rel. AK Native Vill. Corps. v. AHTNA, Inc.*, 105 F.3d 1281, 1284-85 (9th Cir.1997).

Appellants argue that the district court lacked removal federal question jurisdiction over this action and therefore, that the case was improperly removed to federal court. We review the issue de novo. *Prize Frize, Inc. v. Matrix (U.S.) Inc.*, 167 F.3d 1261, 1265 (9th Cir.1999). We also review de novo the district court's denial of the motion to remand. *ARCO Env't Remediation, L.L.C. v. Dept. of Health and Env't Quality*, 213 F.3d 1108, 1111 (9th Cir.2000). The district court had subject matter jurisdiction because the complaint raises a substantial federal question of whether Section 7(r) of ANCSA, 43 U.S.C. § 1606(r), authorizes CIRI to pay dividends to Native leaders who were original CIRI shareholders.

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[2] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3

Appellants argue that the district court erred in holding that ANCSA preempts the Alaska corporations statute. We review the district court's decision regarding preemption de novo. *Williamson v. General Dynamics Corp.*, 208 F.3d 1144, 1149 (9th Cir.2000). The plain language of § 7(r) allows CIRI to make the distributions made in this case. 43 U.S.C. § 1606(r). ANCSA expressly preempts Alaska law. 43 U.S.C. § 1606(p). Moreover, legislative history of § 7(r) confirms that Congress intended that ANCSA corporations provide the type of benefits provided by CIRI in this case. 144 Cong. Rec. 12589-01 (1998) (daily ed. October 14, 1998) (statement of Sen. Murkowski). Thus, the district court did not err in granting summary judgment.

AFFIRMED.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-35521

EMIL NOTTI, *et al.*, PLAINTIFFS - APPELLANTS

v.

COOK INLET REGION, INC. , DEFENDANT - APPELLEE

Filed April 21, 2001

ORDER

Before: ALARCON and SILVERMAN, Circuit Judges, and BREWSTER, District Judge[3]

Appellants' Petition for Rehearing is DENIED.

Counsel for Appellants is advised that the Reply Brief was accepted for filing on February 28,2002.

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[3] The Honorable Rudi M. Brewster, Senior United States District Judge for the Southern District of California, sitting by designation.

Constitutional and Statutory Provisions Involved

Alaska Corporations Code (AS 10.06)

TITLE 10 — Corporations and Associations
Chapter 06. Alaska Corporations Code (underlining added)

AS 10.06.305. Creation, classes, and issuance of shares.

(a) Subject to the provisions of this chapter, a corporation may issue one or more classes or series of shares or both, with full, limited, or no voting rights and with other rights, preferences, privileged, and restrictions as are stated or authorized in its articles of incorporation. A denial or limitation of voting rights is not effective unless at the time one or more classes or series of outstanding shares or debt securities, singly or in the aggregate, are entitled to full voting rights. A denial or limitation of dividend or liquidation rights is not effective unless at the time one or more classes or series of outstanding shares, singly or in the aggregate, are entitled to unlimited dividend or liquidation rights.

(b) All shares of a class shall have the same voting, conversion, and redemption rights and other rights, preferences, privileges, and restrictions, unless the class is divided into series. If a class is divided into series, all the shares of a series shall have the same voting, conversion, and redemption rights and other rights, preferences, privileges, and restrictions. (§ 1 ch 166 SLA 1988).

AS 10.06.313. Variation in rights and preferences of shares. Any or all of the rights and preferences of a series of a preferred or special class of shares and the variations in the relative right and preferences between different series may be fixed and determined by the articles of incorporation, but shares of the same class shall be identical except of the

following relative rights and preferences as to which there may be variations between series:

(1) the rate of dividend

(2) the price and the terms and conditions on which shares may be redeemed;

(3) the amount payable upon shares in the even of involuntary liquidation;

(4) the amount payable upon shares in the even of voluntary liquidation;

(5) sinking fund provisions for the redemption or purchase of shares;

(6) the terms and conditions on which shares may be converted, if the shares of a series are issued with the privilege of conversion;

(7) voting rights, if any. (§ 1 ch 166 SLA 1988)

Sec. 10.06.408. Closing of transfer books and fixing record date.

(a) To determine the shareholders entitled to notice of or to vote at a meeting of shareholders or an adjournment of a meeting, or to determine the shareholders entitled to receive payment of a dividend, or to determine the shareholders for any other proper purpose, the board of a corporation may provide that the stock transfer books shall be closed for a stated period not exceeding 70 days. If the stock transfer books are closed to determine shareholders entitled to notice of or to vote at a meeting of shareholders, they shall be closed for at least 20 days immediately preceding the meeting.

(b) Instead of closing the stock transfer books, the bylaws or, in the absence of an applicable bylaw, the board may fix a date as the record date for the determination of shareholders. This record date may not be more than 60 days and, in case of a meeting of shareholders, not less than 20 days before the date on which the particular action requiring

the determination of shareholders is to be taken. If the stock transfer books are not closed and a record date is not fixed for the determination of shareholders entitled to notice of or to vote at a meeting of shareholders or for the determination of shareholders entitled to receive payment of a dividend, the date on which notice of the meeting is mailed or the date on which the resolution of the board declaring the dividend is adopted, is the record date for the determination of shareholders. When a determination of shareholders entitled to vote at a meeting of shareholders has been made as provided in this section, the determination applies to an adjournment of the meeting of shareholders.

AS 10.06.478. Director conflicts of interest.

(a) A contract or other transaction between a corporation and one or more of the directors of the corporation, or between a corporation and a corporation, firm, or association in which one or more of the directors of the corporation has a material financial interest, is neither void nor voidable because the director or directors or the other corporation, firm, or association are parties or because the director or directors are present at the meeting of the board that authorizes, approves, or ratifies the contract or transaction, if the material facts as to the transaction and as to the director's interest are fully disclosed or known to the

(1) shareholders and the contract or transaction is approved by the shareholders in good faith, with the shares owned by the interested director or directors not being entitled to vote; or

(2) board, and the board authorizes, approves, or ratifies the contract or transaction in good faith by a sufficient vote without counting the vote of the interested director or directors, and the person asserting the validity of the contract or transaction sustains the burden of proving that the contract or transaction was just and reasonable as to the

corporation at the time it was authorized, approved, or ratified.

. . . .

AS 10.06.542. Disparate treatment of shares of the same class or series prohibited; exceptions.

(a) Except as provided in (b) of this section all shares of the same class or series shall be treated equally with respect to a distribution of shares, cash, property, rights, or securities in any plan of merger, consolidation, or share exchange.

(b) Disparate treatment of shares of the same class or series may be proposed in a plan of merger, consolidation, or share exchange if

(1) disparate treatment is necessary to preserve a subchapter S election under the Internal Revenue Code of 1954;

(2) there is a sound business reason for disparate treatment and proponents of the plan prove it is consistent with fiduciary duties owed to all shareholders; or

(3) there is unanimous consent of all shareholders. (§ 1 ch 166 SLA 1988).

AS 10.06.960. Corporations organized under ANCSA.

(a) A corporation organized under 43 U.S.C. 1601 - 1629e as amended (Alaska Native Claims Settlement Act) shall be incorporated under and is subject to this chapter except

(1) each corporation shall issue without further consideration the number of shares of common stock that may be necessary to comply with the requirements of the act and all stock so issued is considered fully paid and nonassessable when issued;

(2) unless otherwise provided in the articles of incorporation, the capital

(A) is considered the consideration for the initial issuance of shares; and

(B) of a corporation organized under the act includes the

(i) land or interests in it conveyed to the corporation by the United States under the act, except that which is required to be conveyed under 43 U.S.C. 1613(c)(1), (3), and (4), entered at its fair value to the corporation upon receiving the conveyance of it; and

(ii) money, when received under 43 U.S.C. 1605 and 43 U.S.C. 1608, that is retained by the corporation and that is not immediately distributed or required to be distributed under 43 U.S.C. 1606(j).

. . . .

(f) Notwithstanding the other provisions of this chapter, a corporation organized under the act is governed by the act to the extent the act is inconsistent with this chapter, and the corporation may take any action, including amendment of its articles, authorized by the act, and the action is considered to be approved and adopted if approved under the act. An amendment approved under the act and delivered to the commissioner under AS 10.06.512 shall be filed by the commissioner under AS 10.06.910, and a certificate of amendment shall be issued.

AS 10.06.990. Definitions.

In this chapter, unless the context otherwise requires,

. . . .

(17) "distribution to its shareholders" means the transfer of cash or property by a corporation or its subsidiary to its shareholders without consideration, whether by way of dividend or otherwise, except a dividend in shares of the

corporation, or the purchase or redemption of its shares for cash or property; the time of a distribution of a dividend is the date of the declaration of the dividend and the time of a distribution by purchase or redemption of shares is the date cash or property is transferred by the corporation, whether or not under a contract of an earlier date; . . . .

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CONSTITUTION OF THE UNITED STATES

ARTICLE III — THE JUDICIARY

Section 2, Clause 1. Jurisdiction of Courts

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases . . . .

U.S. Code, Title 28, Judiciary and Judicial Procedure Chapter 85, District Courts; Jurisdiction Chapter 89, District Courts; Removal of Cases from State Courts

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the

district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c - e) (omitted)

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U.S. Code, Title 43, Public Lands, Chapter 33,

Alaska Native Claims Settlement Act [ANCSA]

(underlining added)

ANCSA § 2(f) [43 U.S.C. § 1601(f)] — Declaration of Policy.

Congress finds and declares that —

. . . .

(f) no provision of this Act shall be construed to constitute a jurisdictional act, to confer jurisdiction to sue, nor to grant implied consent to Natives to sue the United States or any of its officers with respect to claims extinguished by the operation of this Act; and . . . .

ANCSA § 3 [43 U.S.C. § 1602] — Definitions.

. . . .

(g) "Regional Corporation" means an Alaska Native Regional Corporation established under the laws of the State of Alaska in accordance with the provisions of this Act;

. . . .

(t) "Settlement Trust" means a trust —

(1) established and registered by a Native Corporation under the laws of the State of Alaska pursuant to a resolution of its shareholders, and

(2) operated for the sole benefit of the holders of the corporation's Settlement Common Stock in accordance with section 39 [ANCSA § 39, 43 U.S.C. § 1629e] and the laws of the State of Alaska.

ANCSA § 7(d) [43 U.S.C. § 1606(d)] — Procedures for incorporation.

(d) Five incorporators within each region, named by the Native association in the region, shall incorporate under the laws of Alaska a Regional Corporation to conduct business for profit, which shall be eligible for the benefits of this Act so long as it is organized and functions in accordance with this Act. The articles of incorporation shall include provisions necessary to carry out the terms of this Act.

ANCSA § 7(h)(1)(A) [43 U.S.C. § 1606(h)(1)(A)]

REGIONAL CORPORATIONS—SETTLEMENT STOCK—

7(h)(1) RIGHTS AND RESTRICTIONS.—

(A) Except as otherwise expressly provided in this Act, Settlement Common Stock of a Regional Corporation shall—

(i) carry a right to vote in elections for the board of directors and on such other questions as properly may be presented to shareholders;

(ii) permit the holder to receive dividends or other distributions from the corporation; and

(iii) vest in the holder all rights of a shareholder in a business corporation organized under the laws of the State.

ANCSA § 7(p) [43 U.S.C. § 1606(p)]

(p) FEDERAL-STATE LAWS, CONFLICTS.

In the event of any conflict between the provisions of this section and the laws of the State of Alaska, the provision of this section shall prevail.

ANCSA § 7(r) [43 U.S.C. § 1606(r)]

(r) BENEFITS FOR SHAREHOLDERS OR IMMEDIATE FAMILIES.

The authority of a Native Corporation to provide benefits to its shareholders who are Natives or descendants of Natives or to its shareholders' immediate family members who are Natives or descendants of Natives to promote the health, education, or welfare of such shareholders or family members is expressly authorized and confirmed. Eligibility for such benefits need not be based on share ownership in the Native Corporation and such benefits may be provided on a basis other than pro rata based on share ownership.

Supreme Court U.S.
FILED
DEC 12 2002
OFFICE OF THE CLERK

No. 02-392

IN THE

Supreme Court of the United States

EMIL NOTTI, *et al.*,

Petitioners,

v.

COOK INLET REGION, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is the federal question that Plaintiffs' state law claims necessarily present – whether a recent amendment to the Alaska Native Claims Settlement Act authorizes Cook Inlet Region, Inc. to distribute cash payments to its elders – sufficiently "substantial" to justify the District Court's assertion of federal subject matter jurisdiction?

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

Plaintiffs/Petitioners are five individuals: Emil Notti, James Grotha, Glen Kerr, Sam Pedro, and Ella Ring. Each of the Plaintiffs is a shareholder in Cook Inlet Region, Inc.

The Defendant/Respondent is Cook Inlet Region, Inc. ("CIRI"), a Regional Native Corporation established pursuant to the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. § 1601 *et seq.*, and headquartered in Anchorage, Alaska.

Pursuant to Sup. Ct. R. 29.6, CIRI notes that it has no parent corporation, and that no publicly held company owns 10% or more of CIRI's stock.

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I. OPINIONS BELOW

CIRI agrees with Petitioners' description of the orders and opinions below, except that the Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court for the District of Alaska in an unpublished Memorandum, not in a published Opinion as Petitioners suggest in their Brief. *Cf.* Ninth Cir. R. 36-1 (distinguishing between Memoranda and Opinions).

II. JURISDICTION IN THIS COURT

CIRI agrees that Petitioners properly have invoked this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

III. STATUTES INVOLVED

CIRI submits that only three statutory provisions are "involved" in the question whether this Court should grant a writ of certiorari. *Cf.* Sup. Ct. R. 24(f). They are as follows:

(1) 28 U.S.C. § 1331 authorizes "federal question" or "arising under" jurisdiction:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

(2) AS 10.06.960(f), a provision in the Alaska Corporations Code, prescribes the manner in which that state code applies to Alaska Native Corporations:

> Notwithstanding the other provisions of this chapter [*i.e.*, the Alaska Corporations Code], a corporation organized under [ANCSA] is governed by [ANCSA] to the extent [ANCSA] is inconsistent with this chapter, and the corporation may take any action . . . authorized by [ANCSA] . . . .

(3) ANCSA Land Bank Protection Act of 1998, Pub. L. No.

105-333, § 12, 112 Stat. 3129, 3135, *codified at* 43 U.S.C. § 1606(r), an amendment to ANCSA that the parties agree is inconsistent with certain provisions of the Alaska Corporations Code, and that CIRI contends (and the District Court and the Court of Appeals concluded) authorizes CIRI to distribute cash payments to its elders:

> Section 7 of the Alaska Native Claims Settlement Act (43 U.S.C. § 1606) is amended by adding at the end the following:
>
> BENEFITS FOR SHAREHOLDERS OR IMMEDIATE FAMILIES. – The authority of a Native Corporation to provide benefits to its shareholders who are Natives or descendants of Natives or to its shareholders' immediate family members who are Natives or descendants of Natives to promote the health, education, or welfare of such shareholders or family members is expressly authorized and confirmed. Eligibility for such benefits need not be based on share ownership in the Native Corporation and such benefits may be provided on a basis other than pro rata based on share ownership.

IV. STATEMENT OF THE CASE

This case presents a one-of-a-kind jurisdictional question that turns on the unique interplay of a single provision of the Alaska Corporations Code and a single amendment to ANCSA. The jurisdictional question in this case has no broad import outside its singular set of facts and law. This case does not implicate any "circuit split," and Petitioners cannot cite a single decision that "conflicts" in any way with the decision of the Ninth Circuit in this case. Contrary to Petitioners' assertion, there is no decisional split concerning the circumstances in which Congress's creation of a private right of action to enforce a federal statute is a necessary predicate for federal subject matter jurisdiction over state law

claims incorporating such a federal law. Even if there were a circuit split, the Ninth Circuit's decision in this case would not bear on it given the unusual circumstances in this case. Further, the orders of the District Court and the Court of Appeals are unpublished.

The orders also are undoubtedly correct: Petitioners' "right to relief depends upon the construction or application of . . . the laws of the United States," *see Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 199 (1921), and the federal question plaintiffs' claims present is "substantial." *See Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 13 (1983).

Plaintiffs in this case challenge the legality of CIRI's "Elders Benefit Program," by which CIRI makes quarterly cash payments to its elders, on the principal ground that the benefits purportedly constitute a discriminatory dividend in violation of the Alaska Corporations Code.

CIRI established its program soon after Congress amended ANCSA to confirm expressly that Native Corporations may distribute benefits, such as the elders benefits at issue here, on a basis *other* than pro rata based on share ownership.

Congress saw fit to amend ANCSA in this way because a decision of the Supreme Court of Alaska, *Hanson v. Kake Tribal Corp.*, 939 P.2d 1320 (Alaska 1997), had cast doubt on the legality of Native Corporations' provision of such benefits to their shareholders and their families. The plaintiffs in *Hanson v. Kake* successfully challenged as a discriminatory dividend a Native Corporation's provision of insurance and

death benefits to shareholders.[1] In response, Congress enacted section 12 of the ANCSA Land Bank Protection Act of 1998, Pub. L. No. 105-333, 112 Stat. 3129, 3135, *codified at* 43 U.S.C. § 1606(r). As amended, ANCSA now provides:

> The authority of a Native Corporation to provide benefits to its shareholders who are Natives or descendants of Natives or to its shareholders' immediate family members who are Natives or descendants of Natives to promote the health, education, or welfare of such shareholders or family members is expressly authorized and confirmed. Eligibility for such benefits need not be based on share ownership in the Native Corporation and such benefits may be provided on a basis other than pro rata based on share ownership.

43 U.S.C. § 1606(r).

Senator Murkowski of Alaska made clear in debate that the purpose of the amendment was to "confirm[] the original intent of ANCSA in 1971: that ANCSA corporations could provide health, education and welfare benefits for Alaska Natives, including those persons who were their shareholders." 144 Cong. Rec. S12,589 (daily ed. Oct. 14, 1998) (statement of Sen. Murkowsi). Senator Murkowski

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[1] Counsel for Petitioners in this case also was counsel for plaintiffs in the *Hanson v. Kake* case, and has been counsel for plaintiffs in several other cases in which plaintiffs have alleged that Native Corporations have provided benefits to shareholders that constitute discriminatory dividends, or otherwise violate the law. *See Broad v. Sealaska Corp.*, 85 F.3d 422 (9th Cir. 1996) (affirming summary judgment for the Native Corporation); *Demmert v. Kootznoowoo, Inc.*, 960 P.2d 606 (Alaska 1998) (reversing summary judgment for Native Corporation on procedural grounds because court had not given adequate notice that it was converting a 12(b)(6) motion into a motion for summary judgment); *Sierra v. Goldbelt, Inc.*, 25 P.3d 697 (Alaska 2001) (affirming summary judgment for the Native Corporation).

noted that the *Hanson v. Kake* decision was "inconsistent with the intent behind ANCSA." 144 Cong. Rec. S12,589. The Senator specifically indicated that by its passage of section 7(r), Congress intended to authorize programs involving "elder benefits including cash payments." *Id.* He further stated that "these programs represent an important part of the ANCSA corporations." *Id.*

In May 2000, CIRI implemented its Elders Benefit Program – a revocable trust that provides quarterly payments of $450 to all living persons who received shares in CIRI as original enrollees and have reached the age of sixty-five. Notwithstanding Congress's express authorization of elders benefit programs such as CIRI's, Petitioners sued CIRI in Alaska state court in June 2000, alleging that CIRI's program violated various provisions of the Alaska Corporations Code, as well as Alaska common law.

The Alaska Corporations Code, however, has a unique feature. Although ANCSA provides that Regional Native Corporations such as CIRI are to be "established under the laws of the State of Alaska," *see* 43 U.S.C. § 1602(g), ANCSA itself plays a significant role in regulating the internal corporate affairs of these corporations. *See, e.g.*, 43 U.S.C. § 1606(e) (Secretary of Interior must approve Native Corporations' articles of incorporation and bylaws); 43 U.S.C. § 1606(h)(2)(C) (only Natives may own voting shares of stock). The Alaska Corporations Code accounts for this unusual system of simultaneous state and federal regulation of internal corporate affairs by providing expressly that, in the case of any inconsistency between the state code and ANCSA, ANCSA provides the applicable rule of conduct:

> Notwithstanding the other provisions of this chapter [*i.e.*, the Alaska Corporations Code], a corporation organized under [ANCSA] is governed by [ANCSA] to the extent [ANCSA] is inconsistent with this chapter, and the corporation may take any action ... authorized by [ANCSA]

. . . .

AS 10.06.960(f).

The effect of this provision is to incorporate into the Alaska Corporations Code any provision of ANCSA, including, in CIRI's view, 43 U.S.C. § 1606(r), that arguably is "inconsistent" with the code, or that authorizes any action by a Native Corporation. The result is that, whenever ANCSA is inconsistent with the Alaska Corporations Code, or authorizes a certain action, it is impossible to determine whether the Native Corporation has complied with state law without looking to ANCSA. Accordingly, Petitioners' allegation that CIRI violated the Alaska Corporations Code in implementing its Elders Benefit Program necessarily requires reference to ANCSA, and necessarily requires resolving the substantial federal question of whether ANCSA authorizes the program.

CIRI therefore removed the case to the U.S. District Court for the District of Alaska.

Petitioners moved to remand. Prior to the hearing on the motion to remand, the District Court issued a thirteen-page preliminary order, tentatively concluding that it had subject matter jurisdiction.[2] The District Court then conducted

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[2] The District Court's preliminary order also invited CIRI to bring an early dispositive motion if the Court concluded that it in fact did have jurisdiction. The District Court quoted 43 U.S.C. § 1606(r), and then noted:

> Applying the ANCSA provision quoted above in conjunction with state law would seem to lead one to the inevitable conclusion that it is entirely permissible for an ANCSA corporation to allot shareholder dividends on a preferential basis. This being the case, it is difficult to understand how CIRI would not be entitled to some form of dispositive relief upon motion. . . . For purposes of expediting both an appeal of the subject matter jurisdiction issues raised in Notti's motion and the ultimate disposition of the controversy, it may be most efficient for the parties to move for dispositive relief immediately if the court denies the motion to remand.

Pet. for Writ of Cert. App. A at 13a – 14a.

argument, and, subsequently, issued an order concluding that it did have subject matter jurisdiction. Its reasoning was straightforward. The District Court held that, by virtue of the provision in the Alaska Corporations Code that incorporates any provision of ANCSA that is inconsistent with the Code or that authorizes conduct by a Native Corporation,

> application of Alaska state law "turns on" construction of ANCSA, which is undeniably a federal law. . . . ANCSA is an integral part of the state provisions forming the basis of Notti's complaint. The substantive scope of state law is defined by reference to federal law. The federal question does not arise as a defense; instead, it defines the nature of state law. Under these circumstances – admittedly somewhat unique – federal law is a "necessary element" of the state claim. Federal question jurisdiction exists.

Pet. for Writ of Cert. App. B at 17a – 18a.

In February 2001, Petitioners sought leave to file an interlocutory appeal of the District Court's denial of the motion to remand, and CIRI filed a motion for summary judgment. Petitioners never opposed the motion for summary judgment. Instead, Petitioners filed a motion seeking to stay the case pending the District Court's decision on whether to grant leave to seek interlocutory review of the jurisdictional determination. On May 1, 2001, the District Court issued an order granting summary judgment, and denying as moot the motion for leave to seek interlocutory review and the motion to stay. On May 2, 2001, the District Court entered judgment for CIRI, and subsequently denied Petitioners' motion for reconsideration.

Petitioners then appealed to the U.S. Court of Appeals for the Ninth Circuit, challenging the District Court's assertion of jurisdiction, and its grant of summary judgment on the merits. Because CIRI had suspended Elders Benefit Program

payments on account of the pendency of the litigation, CIRI filed a motion to expedite the hearing on the appeal, which the Court of Appeals granted. The Court of Appeals heard argument on March 5, 2002, and issued an unpublished Memorandum on March 22, 2002, affirming the judgment of the District Court.

Petitioners then filed the instant Petition for Certiorari, challenging the Ninth Circuit's conclusion that the District Court had subject matter jurisdiction. CIRI initially waived its right to respond to the Petition, but this Court, on November 2, 2002, requested that CIRI file this response.

V. ARGUMENT

A. The Court Of Appeals Properly Applied Principles Of Law That Are Not In Dispute

The Court of Appeals analyzed the jurisdictional question in this case as follows:

> The district court had subject matter jurisdiction because the complaint raises a substantial federal question of whether Section 7(r) of ANCSA, 43 U.S.C. § 1606(r), authorizes CIRI to pay dividends to Native leaders who were original CIRI shareholders.

Pet. for Writ of Cert. App. D at 28a. This analysis is a correct application of settled law.

"The general rule is that where it appears from the bill or statement of the plaintiff that the right to relief depends upon the construction or application of the Constitution or laws of the United States, and that such federal claim is not merely colorable, and rests upon a reasonable foundation, the District Court has jurisdiction . . . ." *Smith*, 255 U.S. at 199. Therefore, "[e]ven though state law creates [the plaintiff's] causes of action, its case might still 'arise under' the laws of the United States if a well-pleaded complaint established that

its right to relief under state law requires resolution of a substantial question of federal law in dispute between the parties." *Franchise Tax*, 463 U.S. at 13. In other words, "a case may arise under federal law 'where the vindication of a right under state law necessarily turned on some construction of federal law.'" *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 808 (1986) (quoting *Franchise Tax*, 463 U.S. at 9). Accordingly, in order to find federal subject matter jurisdiction under *Smith* and *Franchise Tax*, the federal question presented by the state law cause of action must be both "necessary" and "substantial."

Here, by virtue of the provision in the Alaska Corporations Code that incorporates those portions of ANCSA that are inconsistent with the code or that authorize specific acts, Peittioners' claims that arise under the Alaska Corporations Code necessarily require resolution of the federal question whether 43 U.S.C. § 1606(r) in fact authorizes CIRI's Elders Benefits Program.

Petitioners do not dispute that their state law claims *necessarily* require resolution of this question. *See, e.g.*, Pet. for Writ of Cert. at i ("The ultimate issue is whether the incorporation of a federal law by state law allows the removal under 28 U.S.C. § 1441 to federal court of a state corporate law claim . . . and the subsequent finding of federal jurisdiction under § 1331."); *cf. Rains v. Criterion Sys.*, 80 F.3d 339, 345-46 (9th Cir. 1996) (holding that removal was improper where determination of federal question was not "necessary" to determining whether plaintiff's termination

violated public policy).[3]

Rather, Petitioners argue that the particular federal question incorporated in their state law claims is not sufficiently "substantial" to trigger *Smith/Franchise Tax* jurisdiction. Specifically, Petitioners argue that the question whether 43 U.S.C. § 1606(r) authorizes the Elders Benefits Program is not a "jurisdiction-triggering federal question" because 43 U.S.C. § 1606(r) – which is the source of the federal question here – does not itself create a private right of action. Petitioners base this argument on this Court's 1986 decision in *Merrell Dow*.

But *Merrell Dow*, and the body of decisional law it has spawned, is inapplicable to the jurisdictional question presented in this case. *Merrell Dow* simply applied the bedrock principle laid down in *Smith* and in *Franchise Tax* – that a state law claim that *necessarily* requires resolution of a *substantial* federal question gives rise to federal jurisdiction – to the particular situation (not presented by this case) in which a plaintiff alleges as a part of a state law claim that the defendant has *violated* a federal standard.

The plaintiffs in *Merrell Dow* filed a state law negligence claim against the maker of the drug Benedictin, which was alleged to cause birth defects, alleging that the manufacturer had violated its duty of care by "misbranding" the drug in

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[3] Perplexingly, and notwithstanding Petitioners' concession that their state law claims incorporate a federal question, Petitioners also argue that the District Court's assertion of jurisdiction was improper because the federal question arises only by virtue of CIRI's federal preemption *defense*. *See, e.g.*, Pet. for Writ of Cert. at 18-19; Pet'rs Supplemental Brief at 5-6. Of course, CIRI never has asserted that its federal preemption defense conferred subject matter jurisdiction, and neither the District Court nor the Court of Appeals so held. *See, e.g.*, Pet. for Writ of Cert. App. A at 6a (District Court order confirming jurisdiction) ("The substantive scope of state law is defined by reference to federal law. The federal question does not arise as a defense; instead, it defines the nature of state law.").

violation of the Federal Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. § 301, *et seq*. This Court concluded that because Congress did not intend that there be a private right of action for:

> misbranding in violation of the FDCA, it would . . . flout, or at least undermine, congressional intent to conclude that the federal courts might nevertheless exercise federal-question jurisdiction and provide remedies for violations of that federal statute solely because the violation of the federal statute is said to be a rebuttable presumption or a proximate cause under state law, rather than a federal action under federal law.

Merrell Dow, 478 U.S. at 812. This Court therefore determined that the lack of a private right of action precluded the district court from exercising federal question jurisdiction.

Merrell Dow itself makes clear that the search for a "private right of action" is necessary only when a plaintiff's state law claim alleges as one of the elements that the defendant has *violated* a federal standard:

> We simply conclude that the congressional determination that there should be no federal remedy for the violation of this federal statute is tantamount to a congressional conclusion that *the presence of a claimed violation of the statute as an element of a state cause of action* is insufficiently "substantial" to confer federal-question jurisdiction.
>
> . . .
>
> We conclude that a *complaint alleging a violation of a federal statute as an element of a state cause of action*, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim "arising under the

Constitution, laws, or treaties of the United States."

Id. at 814, 817 (emphasis added) (quoting 28 U.S.C. § 1331).

Petitioners here, however, have not alleged that CIRI *violated* the provision of ANCSA that gives rise to the necessary federal question. To the contrary, Petitioners assert that that provision cannot even be violated. *See* Pet. for Writ of Cert. at 10 ("ANCSA § 7(r) . . . is a purely permissive statute; it is passive, does not command or prohibit any conduct. Therefore it cannot be violated."). The federal question in this case, in contrast to the federal question in *Merrell Dow*, arises by virtue of the fact that the Alaska Corporations Code directs the court to ANCSA, which defines the scope of the Alaska Corporations Code.

Accordingly, as CIRI argued to the Ninth Circuit, the proper method for determining whether the federal question that these Petitioners' claims necessarily present is sufficiently "substantial" is not to look to see whether Congress intended that there be a private right of action under the amendment to ANCSA, but rather to examine the "*nature* of the federal interest at stake." *See Merrell Dow*, 478 U.S. at 814 n.12 (citing academic commentary explaining that apparently inconsistent Supreme Court holdings simply reflect the varying nature of the federal interests at stake in those cases); *see also id.* (observing that this Court has determined whether federal questions were sufficiently substantial to give rise to federal jurisdiction by looking to "the nature of the federal issue"); *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1056 (9th Cir. 1997) (finding federal jurisdiction over state law claim to enforce Tribal-State compacts in light of the importance of the "federal interest at stake"); *cf.* American Indian Policy Review Comm'n, Pub. L. No. 93-580, 88 Stat. 1910, *reprinted in* 1974 U.S.C.C.A.N. 2194, 2194 (congressional recognition of "the Federal Government's historical and special legal relationship with American Indian people").

This Court has looked to the nature of the federal interest at stake since as long ago as the 1921 *Smith* decision. *Smith* was a shareholder suit to enjoin a corporation from purchasing bonds issued pursuant to federal statutes that the shareholders contended were unconstitutional. *See Smith*, 255 U.S. at 195. The plaintiffs in *Smith* did not allege that the defendant corporation itself violated any federal statute, and this Court did not analyze whether the federal statutes pursuant to which the bonds had issued gave rise to any private right of action. Rather, this Court looked to the fact that plaintiffs' state law claims "concern[] the constitutional validity of an act of Congress, which is directly called into question," *Smith*, 255 U.S. at 201, and concluded that jurisdiction was proper. *See also Merrell Dow*, 478 U.S. at 814 n.12 (explaining the *Smith* decision as motivated by the importance of the federal question).

Here, the federal interest at stake, ensuring the right of Native Corporations organized pursuant to ANCSA to distribute benefits to elders, is compelling[4] – so compelling that Congress thought it necessary to amend ANCSA expressly to confirm the right. *See* 144 Cong. Rec. S12,589 (daily ed. Oct. 14, 1998) (statement of Sen. Murkowski) ("elder benefits including cash payments . . . represent an important part of the ANCSA corporations"). In light of the importance of this federal interest, the Ninth Circuit correctly determined that Petitioners' "complaint raises a substantial federal question of whether Section 7(r) of ANCSA, 43 U.S.C. § 1606(r), authorizes CIRI to pay dividends to Native leaders who were original CIRI shareholders." *See* Pet. for

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[4] The District Court expressly so concluded. In its preliminary order finding jurisdiction, the District Court discussed the "federal interest" approach to determining whether there is federal jurisdiction over state law claims, and found "[t]his 'interest-based' analysis militates in favor of CIRI. The federal interest in Native American affairs generally and ANCSA-related matters in particular is undeniably paramount." *See* Pet. for Writ of Cert. App. A at 8a.

Writ of Cert. App. D at 28a. Accordingly, under settled law, there is federal subject matter jurisdiction in this case.

B. The Court Of Appeals' Ruling Does Not Implicate Any Circuit Split

As set forth above, because Petitioners do not allege a violation of a federal statute as an element of any of their claims, neither the District Court nor the Court of Appeals was called upon to apply *Merrell Dow's* "private right of action" requirement in determining whether there is subject matter jurisdiction in this case. Nonetheless, Petitioners urge that this Court grant certiorari in order to "resolve the conflict among the circuits by adopting a bright line rule that allows § 1331 jurisdiction only when the federal law at issue both creates a private cause of action under federal law *and* also provides a remedy under federal law." *See* Pet. for Writ of Cert. at 13; *see also* Pet'rs Supplemental Brief at 1 ("Recent decisions in the courts of appeals demonstrate the . . . conflicts among the circuits.").

Petitioners' request is misguided. There is no such "conflict among the circuits," and there is no "circuit split."

Petitioners rely heavily on a student-authored Note in the Harvard Law Review, *see* Note, *Mr.* Smith *Goes to Federal Court: Federal Question Jurisdiction over State Law Claims Post*–Merrell Dow, 115 Harv. L. Rev. 2272 (2002) [hereinafter *Mr.* Smith *Goes to Federal Court*], for the proposition that the circuits are split in their application of *Merrell Dow's* private right of action requirement. *See* Pet. for Writ of Cert. at 11 (citing *Mr.* Smith *Goes to Federal Court* at 2272, 2279-82 & nn. 49-52). That Note concludes:

> [T]he circuits have split nearly evenly, and sometimes within themselves, on the status and scope of *Merrell Dow's* private right of action requirement. The crux of the disagreement is whether the presence of a right of action is the only

> road to *Smith* jurisdiction after *Merrell Dow* or whether *Smith* jurisdiction remains open for state law claims that present federal issues that a federal court should decide. As a result of the nearly even split among the appellate courts, litigants will find it difficult to predict whether a court will take jurisdiction over their *Smith* claims in the absence of a federal cause of action.

Mr. Smith *Goes to Federal Court* at 2281-82 (footnotes omitted).

The cases cited in support of the supposed "split," however, reflect nothing more than the fact that *Merrell Dow's* "private right of action" requirement comes into play only when a plaintiff alleges a state law claim that includes as an element the violation of a federal standard.

Thus, the majority of the cases that the Note author concludes *require* a private right of action involve a state law claim alleging a *violation* of federal standard. The Note cites, at 2282 n.51:

- *Zubi v. AT&T Corp.*, 219 F.3d 220, 223 n.5 (3d Cir. 2000), in which the Third Circuit noted in dicta that *Merrell Dow* had required that there be a private right of action when a state law complaint alleges as an element a violation of a federal statute;
- *Sparta Surgical Corp. v. National Ass'n of Sec. Dealers, Inc.*, 159 F.3d 1209, 1212 (9th Cir. 1998), in which the plaintiff alleged that the NASD violated its own (federally authorized) self-regulatory rules;
- *PCS 2000 LP v. Romulus Telecomms. Inc.*, 148 F.3d 32, 35 (1st Cir. 1998), in which the plaintiff had not alleged a violation of any federal standard, but the First Circuit noted in dicta that if the plaintiff had alleged a violation of a particular statute, there still would be no jurisdiction because that statute did not provide a private right of

action; and

- *Sienfeld v. Austen*, 39 F.3d 761, 764 (7th Cir. 1994), in which the plaintiffs in a shareholder derivative action alleged that corporate directors had violated federal antitrust laws.

Others of the cases that the Note concludes, at 2282 n.51, require that the federal statute implicated by a state law claim must provide a private right of action, simply do not so hold:

- *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 622 n.2 (6th Cir. 2000), is a case in which the Sixth Circuit (CIRI believes) misread *Merrell Dow's* private right of action requirement as bearing on whether there is federal jurisdiction even when the plaintiff explicitly alleges a federal claim for violation of a federal statute; and
- *Rogers v. Platt*, 814 F.2d 683, 688 (D.C. Cir. 1987), was not a *Smith* jurisdiction case, but the lead opinion looked to *Merrell Dow* to support the unremarkable proposition that congressional intent should determine whether a federal statute confers federal jurisdiction.

As evidence of the supposed split, the Note also cites certain decisions that the author contends failed to enforce *Merrell Dow's* "private right of action" requirement. Not a single one of those cases, however, represents an instance in which a court found jurisdiction despite a plaintiff's assertion of a state law claim that turned on a violation of a federal statute for which there was no private right of action. The Note cites, at 2282 n.51:

- *Long v. Bando Mfg. of Am., Inc.*, 201 F.3d 754, 759 (6th Cir. 2000), which denied jurisdiction because the federal question in that case, regardless of whether the question related to a federal law that gave rise to a private right of action, was not "necessary";

- *McNeil v. Franke*, 171 F.3d 561, 564 (8th Cir. 1999), in which the Eighth Circuit concluded there was no federal jurisdiction over a quiet title action because the case presented no federal questions;
- *Cabazon Band*, 124 F.3d at 1056, in which the plaintiffs alleged that defendants had violated a Tribal-State Compact, but did not allege that defendants had violated any federal standard;
- *Ormet Corp. v. Ohio Power Co.*, 98 F.3d 799, 806 (4th Cir. 1996), in which the plaintiff sought a declaration that it qualified as an "owner" of certain fossil fuel combustion units within the meaning of the Federal Clean Air Act, but did not allege that the defendant had violated that Act;
- *Virgin Islands Hous. Auth. v. Coastal Gen. Constr. Servs. Corp.*, 27 F.3d 911, 916-17 (3d Cir. 1994), in which the court concluded that there was no federal jurisdiction over an action under the Federal Arbitration Act to confirm or enforce an arbitration award (in which no party appears to have alleged a violation of that Act), even if the underlying dispute might have implicated certain federal regulations; and
- *West 14th St. Comm. Corp. v. 5 W. 14th Owners Corp.*, 815 F.2d 188, 196 (2d Cir. 1987), which held that jurisdiction would exist over a declaratory relief action relating to contracts subject to the federal Condominium and Cooperative Conversion Protection and Abuse Relief Act (but which did allege any violation of that Act), regardless of the presence or absence of a private right of action under the Act, because the Act (like the ANCSA amendment at issue here) defined the boundaries of the parties' contract rights.

Because *Merrell Dow's* specific holding was inapplicable in each of these cases (which the Note describes as not requiring a private right of action), the presence of jurisdiction was appropriately decided based on whether or not the state law claim necessarily required resolution of a

substantial federal question.

Nor do the four recent decisions Petitioners cite in their Supplemental Brief reveal any circuit split implicated by this case:

- *MSOF Corp. v. Exxon Corp.*, 295 F.3d 485 (5th Cir. 2002) (discussed in Pet'rs Supplemental Brief at 2-3), *cert. denied*, 71 U.S.L.W. 3387 (U.S. Dec. 2, 2002), reflects the settled principle that a federal question implicated by a state law claim gives rise to federal jurisdiction only if it is "necessary" to the resolution of the claim. Plaintiffs in that case brought strict liability tort claims alleging violations of state and local regulations, as well as federal regulations, and therefore could have proven their claims without proving any federal violation. *MSOF*, 295 F.3d at 490;
- *Breuer v. Jim's Concrete of Brevard, Inc.*, 292 F.3d 1308, 1308 (11th Cir. 2002) (per curiam) (discussed in Pet'rs Supplemental Brief at 3) involves a "split" in the circuits regarding whether certain language in the Federal Fair Labor Standards Act of 1938 precludes removal – a question entirely unrelated to the jurisdictional question presented here;
- *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 73-74 (2d Cir. 2002) (discussed in Pet'rs Supplemental Brief at 3-4), is not a *Smith* jurisdiction case at all, but mentions *Merrell Dow* simply in the context of clarifying that the "private right of action" requirement is irrelevant to jurisdiction when a plaintiff expressly alleges a federal cause of action for violation of a federal statute; and
- Finally, *Wander v. Kaus*, 304 F.3d 856 (9th Cir. 2002) (amended opinion) (discussed in Pet'rs Supplemental Brief at 4), a case in which plaintiff's state law claim alleged a violation of a federal law for which Congress intended that there be no private right of action, is simply *Merrell Dow* all over again. As the Ninth Circuit noted,

> "Wander's case is materially indistinguishable from *Merrell Dow*." *Wander*, 304 F.3d at 859. The *Wander* case does not, as Petitioners incorrectly suggest, "demonstrate[] the ambiguity within the *Merrell Dow* holding." *See* Pet'rs Supplemental Brief at 4.

In short, there is no "split" on any legal question implicated by this case. *Cf.* Sup. Ct. R. 10(a) (conflict between decisions of Courts of Appeals "on the same important matter" is a consideration in determining whether to grant writ of certiorari); *see also id.* ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."). Rather, the issue decided below was simply whether, under settled law, a particular federal question implicated by a particular state law claim was both "necessary" and "substantial."

VI. THE JURISDICTIONAL QUESTION IN THIS CASE IS UNIQUE AND HAS NO BROAD IMPLICATIONS

Certiorari is inappropriate for other reasons as well.

First, the jurisdictional question is, in the words of the District Court, "somewhat unique." *See* Pet. for Writ of Cert. App. A at 6a. In CIRI's view, that is an understatement. The determination depends on (a) whether a singular feature of the Alaska Corporations Code requires these Petitioners to prove that a particular amendment to ANCSA does not authorize a particular program (which is a question, in the first instance, of state law); and (b) whether determining if ANCSA authorizes elder benefits is sufficiently substantial to justify federal jurisdiction. CIRI is aware of no other pending or threatened cases that pose this sort of jurisdictional question, which will arise only in the rare instance in which a plaintiff sues a Native Corporation for violating a provision of the Alaska Corporations Code that the parties agree is inconsistent with ANCSA.

Accordingly, Petitioners' assertion that "[t]his case is . . . also of great importance to the State of Alaska, to its economy and to its Native peoples," *see* Pet. for Writ of Cert. at 17, is plainly overstated. Also inaccurate is Petitioners' ominous prediction that, absent certiorari in this case, "the internal affairs of Alaska's corporations will no longer be decided by Alaska courts; the Supreme Court of Alaska will no longer be the law giver on matters of corporate law in this State." *See id.* Even if the decision of the Ninth Circuit had precedential value, which it does not, *cf.* Ninth Cir. R. 36-3,[5] the decision's narrow holding rebuts Petitioners' dire predictions. The court held that "the complaint raises a substantial federal question of whether Section 7(r) of ANCSA, 43 U.S.C. § 1606(r), authorizes CIRI to pay dividends to Native leaders who were original CIRI shareholders." *See* Pet. for Writ of Cert. App. D at 28a. Other state law claims against other corporations alleging other wrongs, the proof of which does not depend on what 43 U.S.C. § 1606(r) authorizes, presumably may remain in state court, subject to review by the Supreme Court of

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[5] Ninth Cir. R. 36-3, which expires on December 31, 2002 unless the court votes affirmatively to extend it, establishes that "[u]npublished dispositions and orders of this Court are not binding precedent, except when relevant under doctrines of law of the case, res judicata, and collateral estoppel." If the court does not extend this rule, the former version of Ninth Cir. R. 36-3, which similarly provided that "[a]ny disposition that is not an opinion or an order designated for publication . . . shall not be regarded as precedent," *see* Ninth Cir. R. 36-3 (effective January 1, 1997), will automatically be reinstated. *See* Circuit Advisory Committee Note to Rule 36-3 (July 1, 2000).

Alaska.[6]

There is no reason to grant a writ of certiorari.

VII. CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[6] Accordingly, amicus curiae Jimmie D. Hartley, a CIRI shareholder whose only purported interest in this case is the "interest in having shareholder claims adjudicated in his local state court and in having any appeal decided by the Supreme Court of Alaska," *see* Brief For Jimmie D. Hartley As Amicus Curiae In Supp. Of Pet'rs at 2, will not be aggrieved by the denial of certiorari. To the extent Mr. Hartley might have an interest in precluding the District Court for the District of Alaska from properly asserting federal subject matter jurisdiction, that interest plainly is not legitimate.

Supreme Court, U.S.
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No. 02 – 392

IN THE

Supreme Court of the United States

EMIL NOTTI, ET AL.,

Petitioners,

v.

COOK INLET REGION, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR JIMMIE D. HARTLEY, CIRI SHAREHOLDER, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Does incorporation of a federal law by state law allow the removal under 28 U.S.C. § 1331 to federal court for state corporate law claims of breach of the corporate contract?

2. Should the Court resolve the issues presented and left unresolved in *Merrell Dow*?

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* and STATEMENT OF CONSENT [1]

Jimmie D. Hartley, a shareholder of respondent Cook Inlet Region, Inc., moves for leave to file the attached brief *amicus curiae* that is set out below. This brief *amicus curiae* in support of the petition is submitted pursuant to Rule 37 of the Rules of this Court.

Counsel for petitioner has consented to the filing of this brief and his consent letter will be lodged with the Clerk of the Court. However, counsel for *amicus* has not been able to confer with counsel for the respondent as of the date this brief is being sent to the printer. (In a recent exchange of phone calls with the respondent's attorney, he was only able to agree to forward the amicus' request for consent to the respondent's management.)

If the respondent does grant its consent to the filing of this *amicus* brief, then a letter expressing the consent of the respondent also will be lodged with the Clerk. If the respondent's consent is withheld, then the *amicus* moves pursuant to Rule 37.2(b) for leave to file this *amicus curiae* brief.

The interest of the amicus arises from his status as a shareholder of respondent Cook Inlet Region, Inc. and as a member of the putative class on whose behalf this suit was filed in the state court of Alaska.

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[1] Pursuant to Rule 37.6, amicus states that no counsel for a party authored this brief in whole or part, and no person or entity other than the *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

INTEREST OF THE *AMICUS CURIAE*

Jimmy D. Hartley is a Cook Inlet Region, Inc. shareholder[2] who resides in Anchorage, Alaska. Mr. Hartley has an interest in having shareholder claims adjudicated in his local state court and in having any appeal decided by the Supreme Court of Alaska, which is the ultimate judicial authority in matters of Alaska corporate law. Amicus sees a clear case where the conflicts among the circuits over the issue of what is a federal question are now affecting Alaska Natives in their relationship as shareholders of Alaska native corporations. The conflicts in the circuits should now be resolved.

INTRODUCTION

Amicus supports petitioners' argument that the court of appeals denied the petitioners' appeal in error and that a Writ of Certiorari should be granted.

SUMMARY OF ARGUMENT

Cook Inlet Region, Inc. (CIRI) is an Alaska domestic business-for-profit corporation. The majority of its Alaska Native shareholders live in Alaska. The cause of action arose under Alaska state law and the

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[2] Cook Inlet Region, Inc. (CIRI) has more than 7,000 shareholders, at least half of whom reside within Alaska and many of whom reside in the Lower 48 and elsewhere.

remedy is an Alaskan remedy. The district court erred in denying remand to the Alaska Superior Court. The court of appeals for the Ninth Circuit erred in affirming the district court's decision. The facts of this case highlight the confusion in the circuits over the issue of federal question jurisdiction.

ARGUMENT

This case involves an Alaska Native Corporation incorporated under Alaska state law. The majority of stockholders live in Alaska. Because the corporation's stock is not publicly traded, there is no Securities and Exchange Commission oversight. Also, there are no exchange rules like New York Stock Exchange rules to comply with. There is no Federal Trade Commission oversight. There are no market forces to regulate corporate behavior. Equity analysts do not analyze the stock and report corporate financial results or future prospects to stockholders or to the press. The point is that one of the few remedies for an aggrieved stockholder is the Alaska Corporations Code.

The cause of action in the complaint was discriminatory dividends paid by CIRI. The cause of action arose under the Alaska corporations code for which there is a remedy. Because federal law is incorporated into the Alaska corporations code under A.S. 10.06.960(f), federal and state law come into contact. Such laws have been termed hybrid laws. The pertinent federal law incorporated into the Alaska corporations code is ANCSA § 7(r) [43 U.S.C. § 1606(r)]. Aggrieved stockholders

must look to either state or federal law for help and not to regulatory agencies like the SEC. Cook Inlet Region, Inc. is one of the largest Alaska Native corporations, but there are over 200 Alaska Native corporations in Alaska organized under ANCSA. This issue of federal question jurisdiction is important to all of these native corporations and their shareholders, because their practical choices to adjudicate disputes is limited to either federal or state law.

ANCSA § 7(r) is vague and does not provide for a separate federal cause of action or a federal remedy. First, the statute refers to the authority of the "Native Corporation to provide benefits to its shareholders . . . to promote the health, education, or welfare of such shareholders". (underline added) No guidance in the statute is given on the payment of dividends. Benefits are not necessarily based on stock ownership and dividends are. A judge in his or her discretion may find that the term benefits encompasses the payment of dividends, but that is a malleable person exercising discretion. Secondly, the statute permits certain behavior like the payments of benefits, but it does not create an express right in the shareholders to these benefits. One sees this permissive character in such sentences as "Eligibility for such benefits need not be based on share ownership in the Native Corporation and such benefits may be provided on a basis other than pro rata based on share ownership." This permissive, passive language is quite different from language creating express rights. This is an important point when considering the ambiguous and conflicting law on when federal question jurisdiction is appropriate.

A judge when confronted with such vague federal law incorporated into a state statute will be familiar with *Merrell Dow Pharmaceuticals v. Thompson,* 478 U.S. 804 (1986). *Merrell Dow* held that when a private right of action was not provided for by Congress to enforce the relevant provision of federal law, federal jurisdiction was inappropriate. Because Congress did not provide a separate federal private right of action based on ANCSA § 7(r), then federal jurisdiction in this case would be inappropriate. This bright-line rule was not the end of the Court's reasoning. The *Merrell Dow* Court also preserved the holding in *Smith v. Kansas City Title & Trust Co.,* 255 U.S. 180 (1921) which held that "right to relief depends on construction or application of the Constitution or laws of the United States". *Id.* at 199. The *Smith* Court emphasized the discretionary nature of federal jurisdiction questions. The *Merrell Dow* Court introduced the discretionary concept of "contextualized inquiry" into the nature of the federal right involved. "Contextualized inquiry" suggests that even if no federal private right of action existed, federal jurisdiction could be found in the presence of a substantial federal interests.

Such "contextualized" inquiries are made by judges of nebulous and abstract concepts such as congressional intent, judicial power, and the federal system. Interpretations by judges of federal statutes are subjective and fallible. Such invitations by the *Merrell Dow* Court to use discretion in defining the scope of federal jurisdiction leads to lack of clarity in the circuits.

There is one case that is helpful in an attempt to define some standards when a judge uses discretion.

Soon after *Merrell Dow* was decided, the Second Circuit in *West 14th Street Commercial Corp. v. 5 West 14th Owners Corp.*, 815 F.2d 188 (2d Cir. 1987), *cert. denied*, 484 U.S. 850 and 484 U.S. 871 (1987), found that a federal law that determines the "rights and definition of relationships *created by federal law*" was appropriate for federal jurisdiction, despite the non-existence of a federal private right of action. *Id.*, 815 F.2d at 196 (italics in the original). Such positive, proactive language should be contrasted with the permissive, passive language of ANCSA § 7(r) which "authorizes" benefits, and where such "benefits may be provided", but no rights are created. There is no shareholder right to these benefits, and Congress provided for no cause of action or remedy if a shareholder did not receive these benefits.

Federal interests are not as strong under the permissive, passive language of ANCSA § 7(r) as would be under a federal statute that proactively creates rights. The district court judge and the United States District Court of Appeals for the Ninth Circuit overestimated the federal interests implied in ANCSA § 7(r). They should have remanded the case back to the Alaska Superior Court.

Such mistakes are easy to make when discretion is the foundation for justice. 28 U.S.C. §1331 has been a troublesome statute ever since it was enacted in 1875. Leaving the question of federal jurisdiction open to such discretionary concepts as "contextualized inquiry" is an open invitation for confusion in the circuits. Due to the importance of federal question jurisdiction to the Alaska native community, amicus urges the Court to resolve the

confusion in the circuits in favor of easy to understand bright-line rules.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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(4)

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NO. 02-392

IN THE

Supreme Court of the United States

EMIL NOTTI, ET AL.,

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v.

COOK INLET REGION, INC.,

Respondent.

On Petition for a Writ of Certiorari to the
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PETITIONERS' SUPPLEMENTAL BRIEF

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QUESTIONS PRESENTED

Should this Court resolve the issues it left open in *Merrell Dow:*

1. Can the adoption of federal law by a state statute give rise to § 1331 federal question jurisdiction when the federal law does not occupy the field, does not entirely displace state law, does not create a federal cause of action, and does not contain a federal remedy?

2. Should this Court adopt a bright line rule requiring the existence of a private cause of action and remedy under federal law before it will allow § 1331 jurisdiction?

3. Should this Court adopt a bright line rule that a federal law that provides no private remedy cannot supply a "jurisdiction-triggering federal question"† and thus cannot give rise to § 1331 jurisdiction?

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† *Merrell Dow Pharmaceuticals v. Thompson,* 478 U.S. 804, 817 & n.15 (1986).

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PETITIONERS' SUPPLEMENTAL BRIEF

Recent decisions in the courts of appeals demonstrate the confusion in the law of removal jurisdiction and illustrate the conflicts among the circuits.

Pursuant to Supreme Court Rule 15.8, the petitioning shareholders submit this supplemental brief to show how very recent case law — and recently filed petitions for certiorari in other cases — establish the need for review to clarify the law and to promulgate a uniform rule of federal question jurisdiction.

I. RECENT DECISIONS ILLUSTRATE THE CONFLICT AMONG THE CIRCUITS

A recent decision of the Fifth Circuit shows the disparate treatment given to a similar removal issue.

Conflicting Treatment of Removal Issue by 5th & 9th Cirs.

MSOF v. Exxon 295 F.3d 485 (5th Cir. 2002)	***Notti v. CIRI*** 31 Fed.Appx. 586 (9th Cir.'02)
Rejected federal statute as basis for removal jurisdiction	Allowed federal statute as basis for removal jurisdiction
"The vindication of these plaintiffs' rights does not turn on resolution of a federal question." *Id.* at 491	"The district court had subject matter jurisdiction because the complaint raises a substantial federal question"
Recognizes state law cause of action as basis for	State law cause of action trumped by federal statute
Jurisdiction grounded on state law basis by 5th Cir.	Jurisdiction grounded on federal law basis by 9th Cir
"A defense that raises a federal issue is insufficient" *Id.* at 490	Federal issue comes in via CIRI's preemption defense, not via plaintiffs' claims
"There is no federal question jurisdiction arising from preemption." *Id.* at 491	"ANCSA expressly preempts Alaska law" & provides jurisdiction *Id.* at 587
Remand denied by dist. ct.	Remand denied by dist. ct.
Reversed by ct. of appeals	Affirmed by ct. of appeals
Cert petition — No. 02-478	Cert petition — No. 02-392

MSOF Corporation v. Exxon Corporation, 295 F.3d 485 (5th Cir. 2002), *petition for cert. filed sub nom. NPC Services Inc. v. MSOF Corp.*, 71 U.S.L.W. 3247 (U.S. 18 September 2002) (No. 02-478) *Id.*, 295 F.3d at 490 ("A defense that raises a federal question is insufficient").

The *MSOF* case — recently filed on the certiorari docket — is an example of the conflict among the circuits. Review should be granted in both cases to resolve the ambiguity in the law of removal jurisdiction.

Another recent case presenting a conflict among the circuits on removal jurisdiction, and now before this court on its certiorari docket, is *Breuer v. Jim's Concrete of Brevard, Inc.*, 292 F.3d 1308 (11th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3169 (U.S. 3 September 2002) (No. 02-337):

> Because of the long-standing difference among the district courts and the apparent conflict between the Eighth Circuit in *Johnson v. Butler Bros.* and the First Circuit in *Cosme Nieves*, and now with this Circuit, it would appear to be important for either Congress or the United States Supreme Court to resolve this issue and bring uniformity to the federal courts in this regard. Litigants should not be treated with such disparity in our federal system.

Id., 292 F.3d at 1310 & n.3 (underlining added) (citing conflicts among the lower courts and collecting cases).

Just a few weeks ago, the Second Circuit expressed its disagreement with the Sixth Circuit in a case that continues the debate about the meaning of *Merrell Dow's* holding:

> The first matter that needs to be considered is whether this court has jurisdiction to resolve TCG's claims. One circuit court has held, in the context of TCA litigation, that if no private cause of action is created by a statute, the federal courts lack subject matter jurisdiction. *See TCG Detroit v. City of Dearborn,* 206 F.3d 618, 622-24 (6th Cir. 2000) (holding that, because the existence of a cause of action goes to subject matter jurisdiction, courts must determine whether an implied cause of action is created sua sponte, and then concluding that § 253 does imply a private cause of action). White Plains does not argue that there is no private cause of action, but if the issue were jurisdictional, we would have to determine it nonetheless. The Sixth Circuit's reliance on *Merrell Dow Pharm. Inc. v. Thompson,* 478 U.S. 804, 106 S.Ct. 3229, 92 L.Ed.2d 650 (1986), is misguided.

TCG New York, Inc. v. City of White Plains, ___ F.3d ___, 2002 WL 31045144, *4 (2nd Cir., 12 September 2002) (underlining added).

Only a few days later, on 20 September 2002, the Ninth Circuit again demonstrated the ambiguity within the *Merrell Dow* holding when it focused — as it apparently did in *Notti v. CIRI* — on "the nature of the federal interest at stake" instead of upon the presence of a federal cause of action. *Wander v. Kaus*, ___ F.3d ___, 2002 WL 31096289 (9th Cir., 20 September 2002) (but concluding that disability claim did not arise under federal law and affirming dismissal for lack of subject matter jurisdiction).

II. RECENT DECISIONS SHOW THE DISPARATE APPLICATION OF THE RULE PROHIBITING USE OF A PREEMPTION DEFENSE TO SUPPLY REMOVAL JURISDICTION

The rule that prohibits a defendant from removing a state law case to federal court on the basis of a preemption defense — a rule that was *not* applied, but should have been, in *Notti v. CIRI.* The rule was stated long ago in the *Mottley* and *Gully* cases, and renewed in more detail in the 1980's:

> [A] case may not be removed to federal court on the basis of a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue.

Caterpillar, Inc. v. Williams, 482 U.S. 386, 392-93, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987) (citing *Franchise Tax Bd. v. Constr. Laborers Vacation Trust,* 463 U.S. 1, 12, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983)).

Notti v. CIRI is a state law case about a breach of the corporate contract that was removed to federal court. Removed not because the plaintiffs asserted any claim under federal law, but instead because *defendant* inserted the federal issue by way of its defense — the defense of preemption: CIRI argued that state corporate law is preempted by federal law, by ANCSA § 7(r). However, the federal issue cannot come in by way of preemption.

Recent cases have applied correctly the rule that was not obeyed by the Ninth Circuit here in *Notti*: a defense of preemption does not create removal jurisdiction. *Defendant cannot remove from state court by asserting a defense of preemption.*

Recent examples of the correct application of this rule include:

- *Anderson v. H &R. Block, Inc.*, 287 F.3d 1038, 1042 (11th Cir. 2002) ("'Congress has long since decided that federal defenses do not provide a basis for removal.'" citing *Caterpillar Inc. v. Williams*).

- *Abada v. Charles Schwab & Co., Inc.*, 300 F.3d 1112, 1118 (9th Cir. 2002) (appeal dismissed).

- *Arana v. Ochsner Health Plan, Inc.*, 302 F.3d 462, 467(5th Cir. 2002) (ERISA case; remanded).

- *XL Sports, Ltd. v. Lawler*, 2002 WL 31260355 (6th Cir., 8 October 2002) (removal held improper).

The Ninth Circuit's failure to apply the anti-removal rule here in *Notti* conflicts with other decisions, is contrary to Supreme Court precedent, and therefore is a basis for review under Supreme Court Rule 10(c) ("court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court").

III. THESE RECENT CASES ILLUSTRATE THE "WELTER OF ISSUES" SURROUNDING FEDERAL QUESTION JURISDICTION OVER STATE LAW CLAIMS

This Court has described it as a *welter*[1]:

> Especially when considered in light of § 1441's removal jurisdiction, the phrase "arising under" masks a welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system.

Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 8, 77 L.Ed.2d 420, 430, 103 S.Ct. 2841, (1983).

The allocation and sharing of judicial power between state and federal courts is the soul of our federal system. *Mulcahey v. Columbia Organic Chemicals Co. Inc.,* 29 F.3d 148, 151 (4th Cir. 1994) ("Because removal jurisdiction raises significant federalism concerns, we must strictly construe removal jurisdiction."); *Howery v. Allstate Ins. Co.,* 243 F.3d 912, 918-19 (5th Cir. 2001) ("An expansive interpretation of the federal question statute to allow federal courts to assert jurisdiction over cases with tangential and inessential federal components

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[1] *welter*: A confused mass; a jumble. Confusion; turmoil. AMERICAN HERITAGE DICTIONARY (3rd ed. 1992). A state of wild disorder; a chaotic mass. MERRIAM-WEBSTER'S DICTIONARY (10th ed. 1996).

would step upon the authority of state courts to decide state law and ignore the capacity of state courts to decide questions of federal law. It would allow a federal tail to wag the state dog.") (underlining added).

The decisions of the courts of appeals come down on both sides of the removal issue, presenting a conflict among the circuits, and showing the need for a clear rule that is sharp and unambiguous.

An issue of federal law that is a "welter" surely meets the admission tests of Supreme Court Rule 10 and 28 U.S.C. § 2106.

CONCLUSION

This Court should lift the velvet rope and admit these petitioning shareholders so they can file a brief on the merits and explain *why* the allocation of judicial power between the state courts and the federal courts *is the most important issue now before the Court.*

The Petition for Certiorari should be granted *or* the Ninth Circuit's decision should be vacated with instructions to remand to State court.

In the alternative, this Court should summarily reverse the decision of the Court of Appeals. Supreme Court Rule 16.1 and 28 U.S.C. § 2106 ("The Supreme Court . . . may [enter orders] . . . as may be just under the circumstances.").

In the second alternative, this petition should be held over to await the decision of this Court in other pending cases that present similar issues about the jurisdiction of the federal courts in removal cases.[2]

Respectfully submitted this 22nd day of October in 2002 at Petersburg, Alaska.

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[2] E.g., *Syngenta Crop Protection, Inc. v. Henson*, No. 01-757.

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PETITIONERS' REPLY BRIEF

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Should this Court resolve the issues it left open in *Merrell Dow:*

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2. Should this Court adopt a bright line rule requiring the existence of a private cause of action and remedy under federal law before it will allow § 1331 jurisdiction?

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† *Merrell Dow Pharmaceuticals v. Thompson,* 478 U.S. 804, 817 & n.15 (1986).

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PETITIONERS' REPLY BRIEF

CIRI's response overlooks two important principles: *First*, the incorporation of federal law by state law does not allow a state law claim to be removed to federal court unless the federal law creates a federal cause of action and also provides a federal remedy. CIRI's statute, ANCSA § 7(r) does neither. *Second*, the assertion of federal law as a defense to a state law claim, as here in this case, does not provide a legitimate basis for removal to federal court. CIRI's defense is that its federal statute preempts state corporate law. Even if its federal preemption defense were correct, CIRI cannot use it to supply removal jurisdiction in a federal court.

The petitioning shareholders (Notti, et al.) sued their corporation (CIRI) in state court because CIRI is violating bed-rock principles of corporate law in a area of law, corporate governance, that traditionally is left to the states. There is no federal law of corporations.

No part of the shareholders' state law complaint asserts any claim under federal law, only state law causes of action. The complaint is barren of any federal claim.

CIRI removed to federal court on the ground that a federal law, ANCSA § 7(r), codified at 43 U.S.C. § 1606(r), preempts state corporate law and thus authorizes CIRI to pay dividends in violation of state law. The federal issue has come in by way of CIRI's *defense*, not from the shareholders' complaint, which makes only state law claims. CIRI removed on the basis of a federal defense: the corporation argues that federal law allows its discrimination[1] and thus CIRI relies upon a defense of federal law, ANCSA § 7(r).

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[1] A doubtful proposition because (a) the statute allows discrimination only against non-Natives but *not* among Natives themselves (the petitioning shareholders are all Alaska Natives) and (b) the statute authorizes charitable or eleemosynary "benefits" but does not authorize payment of corporate distributions or *dividends* on a basis other than pro rata (i.e., per share). ANCSA § 7(r) merely allows a Native corporation to conduct its charitable works without having to do so on a per share basis. But it says nothing about paying hard core dividends on a discriminatory basis, a notion that always has been forbidden and still is. The opinion of Sen. Murkowski is irrelevant because he was not elected to Congress until circa 1981, and therefore he is not qualified to speak with legislative authority on the purpose of ANCSA, which was adopted by Congress in 1971.

I. The "Substantial Federal Question" Test is Too Broad, Too Vague, and Too Subjective to Define Federal Removal Jurisdiction Correctly.

The Ninth Circuit has adopted a wide-reaching jurisdictional test that can be stretched or molded to fit any set of circumstances for which a lower court might wish to justify its assertion of federal jurisdiction:

> The district court had subject matter jurisdiction because the complaint raises a substantial federal question of whether Section 7(r) of ANCSA, 43 U.S.C. § 1606(r), authorizes CIRI to pay dividends to Native leaders who were original CIRI shareholders.

Notti v. C.I.R.I., 31 Fed.Appx. 586 (9th Cir. 2002). Petition for Certiorari, Appendix D at 28a (underlining added).

CIRI's attempt to restate the question presented illustrates the misunderstanding that has resulted from *Merrell Dow*: A test of "sufficiently 'substantial'" is too broad, too vague, and too subjective to define the federal removal jurisdiction.

Some federal courts that have decided shareholder claims in cases analogous to this one have recognized that the "substantial federal question" test is way too broad. A recent example is *Donovan v. Rothman*, 106 F.Supp.2d 513, 516 (S.D.N.Y. 2000) (action by shareholders against corporation; after removal by corporate defendant, remanded because plaintiffs' allegations of breach of fiduciary duty by violating federal Medicare statute did not present substantial federal question: "the absence of a private right of action in the statute 'counsels against a finding of federal question jurisdiction' and it significance 'cannot be overstated,'" citing

Barbara v. New York Stock Exchange, Inc., 99 F.3d 49, 53-54 (2nd Cir. 1996) and *Merrell Dow*[2]).

A well-regarded Seventh Circuit decision, also a shareholder suit for breach of fiduciary duty, has noted the importance of the federal cause of action and the federal remedy. *Seinfeld v. Austen,* 39 F.3d 761, 764 & n.2 (7th Cir. 1994) (action by shareholders against corporate directors; federal issue raised by complaint did not provide for a private remedy under a federal cause of action; state law action based upon violation of federal claim does not raise substantial federal question unless there is a federal right of action to enforce federal claim; and collecting cases).

CIRI's reliance in its opposition upon *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050 (9th Cir. 1997), cert. denied, 524 U.S. 926, 141 L.Ed.2d 694, 118 S.Ct. 2319 (1997), is not sound.

Federal jurisdiction in *Cabazon* arises from IGRA, Indian Gaming Reform Act, a federal statutory scheme that *does* create a federal cause of action and that *does* contain a federal enforcement mechanism (i.e., a federal remedy). *See* 25 U.S.C. § 2713 (civil penalties); § 2714-15 (jurisdiction in federal courts). Furthermore, *Cabazon* presents an alternative ground for federal jurisdiction, 28 U.S.C. § 1362 ("brought by any Indian tribe or band"). CIRI is not such an entity, and its lands are not Indian country. That Indian country does not exist in Alaska was settled in *Alaska v. Native Village of Venetie*, 522 U.S. 520, 534, 140 L.Ed.2d 30, 40, 118 S.Ct. 948 (1998).

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2 "The significance of the necessary assumption that there is no federal private cause of action thus cannot be overstated." 478 U.S. at 812

II. When a State Law Claim is Removed to a Federal Court, the Proper Jurisdictional Test Is Whether the Federal Law at Issue Creates a Cause of Action and also Provides a Federal Remedy — ANCSA § 7(r), the Law in this Case, Does Neither.

Some lower federal courts have correctly perceived the flaw in the *Merrell Dow* formula and have divined the importance of an independent federal cause of action and a federal remedy. But not all of the lower courts — hence the split among the circuits.

An example of the correct rule is seen in a very recent decision of the Seventh Circuit that was issued only two months ago: *Rogers v. Tyson Foods, Inc.*, 308 F.3d 785, 788-89 (7th Cir. 2002) (unless the federal law creates a federal remedy, the federal issue will arise only as a defense and thus will not give rise to federal question jurisdiction; collecting cases).

This Court has said that some federal statutes, although intruding into areas of traditional state law, have significance as a rule of decision even though not providing a federal cause of action. *E.g., Thompson v. Thompson,* 484 U.S. 174, 98 L.Ed.2d 512, 108 S.Ct. 513 (1988) (PKPA does not provide an implied cause of action in federal court because Congress intended only that the Act should furnish a rule of decision but not to create a new cause of action).

The following table illustrates the range of views:

Incorporation of Federal Law in State Law Causes of Action — Many of the Circuits Require a Federal Cause of Action, But Others Do Not Use This Analysis:

Case	***Private Right of Action Required?***	***Federal Statute***
Rogers v. Platt [3]	No	PKPA
West 14th St. v. 5 West 14th [4]	Yes	CCARA
Aaron v. National Union [5]	Yes	LHWCA
Seinfeld v. Austen [6]	Yes!	Clayton Act
Cabazon Band v. Wilson [7]	No, *but see* dissent	IGRA
Husmann v. T.W.A. [8]	No, *but see* dissent	Warsaw Cnv
Hart v. Bayer Corp. [9]	Yes	FIFRA

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[3] *Rogers v. Platt,* 814 F.2d 683 (D.C.Cir. 1987) (no, but discussing the possibility of requiring a federal cause of action).

[4] *West 14th St. Comm. Corp. v. 5 West 14th Owners Corp.*, 815 F.2d 188, 193-94 (2nd Cir. 1987).

[5] *Aaron v. National Union Fire Ins. Co. of Pittsburg,* 876 F.2d 1157, 1164 (5th Cir. 1989).

[6] *Seinfeld v. Austen,* 39 F.3d 761, 764 & n.2 (7th Cir. 1994) (collecting cases).

[7] *Cabazon Band of Mission Indians v. Wilson,* 124 F.3d 1050, 1056 (9th Cir. 1997), *cert. denied,* 524 U.S. 926, 141 L.Ed.2d 694, 118 S.Ct. 2319 (1997), *but see* the dissent at 1062-63.

[8] *Husmann v. T.W.A.,* 169 F.3d 1151 (8th Cir. 1999), *but see* the dissent at 1154-55.

[9] *Hart v. Bayer Corp.,* 199 F.3d 239, 245-46 (5th Cir. 2000).

Johnson v. Baylor Univ. [10]	Yes	PRSA
Penobscot Nation v. Ga.Pac[11]	Yes	CWA, etc.
Southwest Air Ambulance Inc. v. City of Las Cruces [12]	Yes	AHTA
Notti v. CIRI [13]	No	ANCSA
Anderson v. H &R. Block [14]	Yes, *but see* dissent	NBA
Breuer v. Jim's Concrete [15]	No	FLSA
Valdivieso v. Atlas Air, Inc.[16]	No	FLSA
Rogers v. Tyson Foods, Inc.[17]	Yes!	PPIA
Donovan v. Rothman [18]	Yes	SSA

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[10] *Johnson v. Baylor Univ.*, 214 F.3d 630, 633 (5th Cir. 2000).

[11] *Penobscot Nation v. Georgia Pacific Corp.*, 254 F.3d 317, 321 (1st Cir. 2001).

[12] *Southwest Air Ambulance Inc. v. City of Las Cruces*, 268 F.3d 1162, 1169 (10th Cir. 2001).

[13] *Notti v. C.I.R.I.*, 31 Fed.Appx. 586 (9th Cir. 2002).

[14] *Anderson v. H &R. Block, Inc.*, 287 F.3d 1038, 1043 (11th Cir. 2002), *certiorari petn. pending*, Case Nos. 02-306 and 02-312.

[15] *Breuer v. Jim's Concrete of Brevard,*[15] 292 F.3d 1308 (11th Cir. 2002), *petition for cert. pending*, Case No. 02-337.

[16] *Valdivieso v. Atlas Air, Inc.,*[16] 305 F.3d 1283 (11th Cir. 2002) *petition for cert. pending*, Case No. 02-728.

[17] *Rogers v. Tyson Foods, Inc.*, 308 F.3d 785, 788-89 (7th Cir. 2002) (collecting cases).

[18] *Donovan v. Rothman*, 106 F.Supp.2d 513, 516-17 (S.D.N.Y.2000).

III. The Proposed Rule Would Resolve the Debate in the Lower Courts and Would Answer the Question About Which Circuits Are Split — When May a State Law Claim be Removed to a Federal Court?

The shareholders propose a bright line rule that would end the confusion and debate about federal removal jurisdiction. Supra at i. CIRI mistakenly argues that the requirement of a federal cause of action (which has its source in the *Smith* case) applies only when the state-law plaintiffs claim a *violation* of federal law. CIRI's Opposition at pgs. 10 - 13. The commentators do not agree. Arthur R. Miller, *Artful Pleading: A Doctrine in Search of Definition*, 76 TEX.L.REV. 1781, 1786-93 (1998); DAVID P. CURRIE, FEDERAL JURISDICTION IN A NUTSHELL, 68 - 75 (4th ed. 1999); MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER, 97 - 105 (2nd ed. 1990); *see generally,* ERWIN CHEMERINSKY, FEDERAL JURISDICTION, § 5.2 et seq. (3rd ed. 1999).

Although some cases do speak of a "violation," this is not an absolute requirement. If it were so, CIRI's theory would federalize vast areas of state law. For example, Alaska adoptions could be removed to federal court because state law incorporates ICWA, 25 U.S.C.

IV. The Issue in this Case is not Unique. Whether State Law Incorporation of Federal Law Creates Federal Removal Jurisdiction is a Topic about which the Lower Courts Are Reaching Differing Conclusions.

Examples can be found in the table at pages 6-7 above, in the Petition and in the Supplemental Brief. See also, CIRI's Brief in Opposition at pgs. 15 -18.

V. Although CIRI's Statute is Narrowly Focused, the Issue of Federal Question Jurisdiction Over State Law Claims is of Nation-Wide Importance.

This case is a proper vehicle to resolve the issue. The facts are uncomplicated and undisputed. It is irrelevant that the statute applies only to Alaska Native corporations. What matters is the universal importance of the jurisdictional issue.

The petitioning shareholders admit that state law does incorporate federal law by reference. Indeed, AS 10.06.960(f)[19] adopts federal law as a rule of decision in Alaska courts, at least where federal law conflicts with state law. This state law is merely an expression of the preemption principle: if state law conflicts with a federal statute (i.e., ANCSA), then federal law controls.

The federal law that is presented here, ANCSA § 7(r), has meaningful application only in Alaska. However, the question of removal jurisdiction presented in this case has importance throughout the Nation. The Alaska Corporations Code is only one of many state laws that incorporate federal law by reference.

Whether incorporation converts a state law claim into a federal claim is the central issue presented in this case? The shareholders argue that mere incorporation is not sufficient. More is required: the federal law at issue must create a federal cause of action, must contain a federal remedy, must displace the state law that otherwise would control, and contain a jurisdictional grant or an expression of Congressional intent that claims made pursuant to the law can be litigated in a federal court.

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[19] Text set out in the Appendix to the Petition at 35a.

CONCLUSION: Forming the Correct Boundary Between State and Federal Judicial Power is an Issue of Substantial Importance; this Case is an Ideal Vehicle to Create a Definitive Jurisdictional Rule.

Alaska law created CIRI's obligations to its shareholders: i.e., to treat them equally, to pay its dividends without discrimination, to use a current record date when making distributions, and to avoid giving special preferences to the directors that are not paid to all shareholders of the same class of stock.[20] No part of the shareholders state law complaint relied upon federal law. Instead, the federal law issue was injected by CIRI's *defense*.

The Petition for Certiorari should be granted *or* the Ninth Circuit's decision should be vacated with instructions to remand to State court. In the alternative, this Court should summarily reverse the decision of the Court of Appeals. In the second alternative, this petition should be held over to await the decision of this Court in other pending cases that present similar issues about the jurisdiction of the federal courts in removal cases.[21]

Respectfully submitted on 27 December 2002.

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[20] Alaska Statutes, AS 10.06.305(b), -.313, -.408, -478, -.542. *See* Cert Petn., Appendix, at 31a – 34a.

[21] E.g., *Anderson v. H&R Block, et al.*, Case Nos. 02-306, 02-312; *Breuer v. Jim's Concrete of Brevard,* Case No. 02-337; *Valdivieso v. Atlas Air, Inc.*, Case No. 02-728.